NO. 83-5267 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, NINETEEN HUNDRED AND EIGHTY-THREE

ROBERT AUSTIN SULLIVAN,

Petitioner,

-v-

LOUIE L. WAINWRIGHT,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

II. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT IT WAS BARRED FROM CONSIDERING THE MERITS OF PETITIONER'S CLAIMS REGARDING JURY INSTRUCTIONS ON THE BASES OF (1) PROCEDURAL DEFAULT AND (2) FAILURE TO SATISFY THE "CAUSE AND PREJUDICE" REQUIREMENT OF Wainwright v. Sykes, 433 U.S. 72 (1977).

III. WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR WAS PROPERLY APPLIED TO PETITIONER'S CASE.

IV. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE REFERENCE TO A POLYGRAPH TEST BY A STATE WITNESS WHICH WAS DEEMED HARMLESS ERROR UNDER STATE LAW DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL OR FEDERAL LAW COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING.

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OPINIONS BELOW

Petitioner's allegations designating the opinions below are correct and acceptable to respondents.

JURISDICTION

Petitioner's jurisdictional allegations are acceptable to respondents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept the constitutional and statutory provisions involved as set forth on p. 2 of the Petition.

PRELIMINARY STATEMENT

References to the Appendix attached to the Petition will be made by the symbol "PA" followed by appropriate page number. References to the appendix attached to this brief in opposition will be made by the symbol "RA" followed by appropriate page number. The record references in respondents' appendix are to the transcript of evidentiary hearing held in the federal district court which is being submitted under separate cover to this Court as Respondents' Exhibit 1.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was convicted of first-degree murder on November 8, 1973 and sentenced to death November 12, 1973. Following his conviction and sentence in the Circuit Court of Dade County, Florida, petitioner appealed to the Supreme Court of Florida. The four issues raised on this appeal were:

> Point I
>
> Whether or not the trial court erred in denying defendant's Motion for Mistrial upon the State's witness referring to a polygraph test;
>
> Point II
>
> Whether the trial court erred in admitting into evidence an enlarged photograph of the victim in view of the fact that all issues pertaining to relevancy of the photograph had been stipulated between counsel;
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> Point III
>
> Whether the arrest of Robert Sullivan was legal and the subsequent seizure of tangible evidence and a confession lawful;
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> Point IV
>
> Whether the provisions of Chapter 72-724, Laws of Florida, 1972, amending Florida Statutes, Sections 775.082, 782.04 and 921.141:
>
> 1. Is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?
>
> 2. Is an arbitrary infliction of punishment as to deprive the defendant of life, liberty or property without due process of law?
>
> 3. Is a denial of the right to a jury trial insured by the Sixth Amendment of the United States Constitution?
>
> 4. Is unconstitutional by embracing more than one subject therein?

Petitioner's conviction and sentence was affirmed on November 27, 1974. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Petitioner then filed a petition for writ of certiorari in this Court which presented two questions:

1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether a prosecutor's knowing, calculated and intentional introduction at a criminal trial in the jury's presence of manifestly inadmissible and prejudicial testimony suggesting that a state's witness has taken and passed a polygraph test is "harmless error" under the due process clause of the Fourteenth Amendment in a capital case where petitioner was subsequently convicted and sentenced to death?

The petition was denied by this Court on July 6, 1976, Sullivan v. Florida, 428 U.S. 911 (1976), reh.denied, 429 U.S. 873 (1976).

More than two years passed before petitioner on March 15, 1979, filed a motion to vacate, set aside or correct sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The motion to vacate was denied by the trial court on May 15, 1979, and affirmed on appeal to the Florida Supreme Court. Sullivan v. State, 372 So.2d 938 (Fla. 1979).

The Governor of Florida on June 19, 1979, signed a warrant directing that petitioner's execution take place on June 27, 1979.

The district court entered an order staying petitioner's execution and referred the matter to a magistrate for evidentiary hearing. Following a two-day plenary hearing the magistrate filed a lengthy review and recommendation recommending that the district judge deny the petition for writ of habeas corpus on the merits. (PA-2a-120a) By order dated June 4, 1981, the district court approved and adopted the magistrate's review and recommendation and lifted the stay of execution previously entered on June 25, 1979, effective thirty days from the date of the order. (PA-122a-130a)

On appeal, the Eleventh Circuit rejected petitioner's claim of ineffective assistance, specifically finding that he received reasonably effective assistance of counsel during the penalty phase and on direct appeal, rejecting all substantive constitutional claims. However, the Eleventh Circuit by order filed June 16, 1983, granted petitioner's motion for stay of execution "pending an application for writ of certiorari" without giving respondent an opportunity to move in opposition thereto. The petition for writ of certiorari was filed in this Court on August 15, 1983, thus automatically lifting the stay of execution previously entered by the court below.

B. Statement of the Facts

On April 10, 1973, at approximately 9:00 a.m., the body of Donald Schmidt was found by two hunters in a remote marshy area in the western part of Dade County, Florida. The Dade County Public Safety Department responded to the scene and Sergeant Arthur Felton of that department testified that the body was face down with the hands bound behind the back with white surgical tape, one shoe was missing, and there was a large wound to the back of the victim's head (Tr. 1240-1242, 1245).[1]

Frank Barden, the manager of the Howard Johnson's restaurant in Homestead, Florida, where Donald Schmidt was the assistant manager, testified that he last saw Schmidt at approximately 9:00 p.m. on April 8, 1973, at the restaurant. Barden said that at approximately 11:15 p.m., he called the restaurant and talked to Schmidt advising Schmidt to meet him at a Holiday Inn when Schmidt was finished with his bookkeeping for the night (Tr. 1215, 1216).

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[1] References are to the record of state trial proceedings.

At midnight, Barden went back to the restaurant and saw Schmidt's car there; however, there were no lights on in the building which was of some concern to him since safety lights were always left on. Barden entered the restaurant, opened the bottom half of a floor safe Schmidt had access to and found that it was empty. He testified that approximately $2700 was missing (Tr. 1217-1219).

During the course of the investigation after the discovery of Schmidt's body, the name of Robert Sullivan came to the attention of Sergeant Felton as a person who had previously worked at the Howard Johnson's restaurant. Sergeant Felton also received information that a person matching Robert Sullivan's description was using a Master Charge credit card of the victim at various Miami stores.

Sergeant Felton obtained information that Sullivan often hung out at Keith's Cruise Lounge in Hallendale, Broward County, Florida. On April 17, 1973, Sergeant Felton, together with three other Dade County Public Safety Department detectives in two cars, went to that location. Prior to going to Keith's Cruise Lounge, Sergeant Felton obtained knowledge about outstanding felony warrants from New Hampshire where Sullivan had been prior to coming to Miami (Tr. 1256).

The detectives arrived at the lounge at approximately 12:00 a.m., and shortly thereafter observed a Cadillac previously described as having belonged to Robert Sullivan and a person whom they believed to be Robert Sullivan exit from the car, together with two other individuals. The three individuals remained in the lounge for approximately three hours after which time Sullivan and the others exited, stood talking in the parking lot for fifteen or twenty minutes, got back in the car and headed toward Miami (Tr. 1331-1335).

The lounge was approximately five or six blocks from the Dade County line, and the car was stopped by Sergeant Felton four or five blocks south of the Dade-Broward County line. Sergeant Felton testified that he stopped the car to arrest Robert Sullivan on the outstanding felony warrants from New Hampshire and so advised Sullivan upon stopping the car (Tr. 1256, 1257).

There were various items in the automobile seized which the state introduced at the trial of Robert Sullivan, including a shotgun, a handgun, white adhesive tape, and other items which the state argued could have been used in the robbery and subsequent murder of Donald Schmidt (Tr. 1262, 1263).

Also introduced into evidence was a watch Sullivan was wearing at the time of his arrest which had belonged to the victim and two credit cards belonging to the victim found in Sullivan's wallet after his arrest (Tr. 1264, 1265).

After Sullivan's arrest, Sergeant Felton advised him of his rights and subsequently took him to the Public Safety Department building, the result of which was a "confession" from Sullivan (Tr. 1253, 1254, 1279). At the time of Sullivan's arrest, there were two other individuals in the car, one being George Jackson and the other Reid McLaughlin. George Jackson was eventually released by the police (Tr. 1339, 1340). After being confronted with Sullivan's "confession", McLaughlin "confessed," implicating Sullivan and was also charged with first-degree murder and robbery.

In petitioner's statement which was introduced at trial (Tr. 1279, 1289), petitioner admitted that Reid McLaughlin and he went to the Homestead Howard Johnson's on the night of April 8, 1973, with the intention of robbing it, that McLaughlin and he counted the customers and employees as they left until they were certain the assistant manager, Donald Schmidt, was inside alone. Petitioner and McLaughlin entered through the back door

and held the assistant manager at gunpoint while the money was taken from the safe. McLaughlin taped Schmidt's hands behind him as petitioner drove to a deserted and swampy area of Dade County. Petitioner and McLaughlin planned to "dispose" of Schmidt by murdering him (Tr. 1288). Upon arriving at a desolate place the victim was removed from the car. When he stumbled, petitioner struck him twice on the head with a tire iron, and taking the shotgun that McLaughlin was carrying, shot him four times in the head. Petitioner and McLaughlin then took Schmidt's watch and credit cards and used the cards several times in Dade County (Tr. 1287-1289).

McLaughlin was the state's chief witness against petitioner. Prior to petitioner's trial, he had agreed to plead nolo contendere to a second degree murder charge in return for a life sentence and his testifying against petitioner. McLaughlin testified that petitioner and he had discussed committing "[t]he perfect crime" (Tr. 1360), and had determined to rob the Howard Johnson restaurant where petitioner had once served as assistant manager (Tr. 1362). McLaughlin entered the restaurant, ordered food, and counted the customers and employees. He and petitioner waited until all of these persons had left except the assistant manager and then entered and held Donald Schmidt at gunpoint. McLaughlin took his jewelry and wallet, and petitioner took the cash from the safe. The two then abducted Schmidt in petitioner's car. McLaughlin taped Schmidt's hands behind him, and since "[h]e was looking kind of worried, . . . I said, 'don't worry about it, and we will leave you in the woods and tie you up.'" (Tr. 1376) McLaughlin then described how he and petitioner stopped the car in a swampy area and led Schmidt away, how petitioner hit Schmidt on the head twice with a tire iron, and how he gave petitioner the shotgun (Tr. 1377, 1378). McLaughlin testified that he then started to walk away and heard petitioner fire the shotgun four

> The remaining issue alleges ineffective assistance of counsel. After an evidentiary hearing, the trial court, in denying Sullivan's motion said:
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> > I have seen some frivolous motions come down the pike, but this has got to take the cake. On the ground of inadequacy of counsel, the motion to vacate is denied.
>
> The transcript of the 3.850 hearing supports this conclusion of the trial court.

Id. at 939. The court then went on to hold that petitioner's claim of ineffective assistance of counsel was without merit.

The magistrate made a thorough review of petitioner's allegations of ineffective assistance of counsel, setting forth in her review and recommendation each of the allegations of ineffective assistance as to Mr. Dean and then proceeded to refute every allegation so raised. The concluding remarks of the magistrate on this issue merit repeating:

> In support of this determination, this Court does not rely upon the petitioner's representation by Mr. Dean subsequent to the petitioner's trial and appeal but must point out, without objection or demurrer by the petitioner, Mr. Dean represented the petitioner, in whole or in part, for approximately five years in legal proceedings before the United States Supreme Court, in a class action suit, before the Parole Board in 1976, and in 1977 clemency proceedings. Although the five year time span is less in the case at bar than the 17 year span in that of Fitzgerald v. Estelle, supra, the petitioner's failure to complain for an extended period of time to authorities with power to act on his complaints must reduce to some degree the credence to be given to the petitioner's position. An exceedingly detailed examination of the entire record and of the testimony given at hearing by Judge Cowart and Judge Gable convinces this Court that Mr. Dean's representation of the petitioner met and even exceeded the standard of reasonably effective assistance of counsel.

Id. at PA 55a, 56a.

The district judge agreed with the conclusions reached by the magistrate. The following quoted from the Final Order of Dismissal is worthy of review:

> This court can add nothing to the thorough, complete and exhaustive discussion of the facts and the law contained in Judge Kyle's review and recommendation.
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> It will be adopted in its entirety and hereinafter made the Order of this Court except as hereinabove modified with respect to respondents' second objection to said Review.
>
> This court's independent de novo review of the record of these proceedings convinces it that petitioner's main claim that he was denied effective assistance of counsel is totally without merit.

(P.A. 129a)

The Eleventh Circuit reviewed petitioner's claim of ineffective assistance, concluding that "Sullivan received reasonably effective assistance of counsel during the penalty phase and on direct appeal." Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983).

Petitioner's claim of ineffective assistance of counsel at the sentencing stage is bottomed on an alleged failure to adequately develop certain evidence regarding a nonstatutory mitigating factor. Apparently petitioner is claiming that his counsel, Mr. Dean, failed to introduce in evidence the letters of Drs. Reichenberg and Corwin. See Petition, at pp. 6-8. Petitioner's counsel had occasion to contemplate use of the defense of insanity. However, after reviewing the reports of Drs. Reichenberg and Corwin, any theory of an insanity-type defense was discarded (RA 2). The reason behind Mr. Dean's failure to put these reports before the jury during the sentencing phase of the trial becomes readily apparent upon examination of Mr. Dean's testimony given at the evidentiary hearing. As noted previously, a copy of the complete transcript of evidentiary hearing is being submitted to this Court under separate cover as Exhibit 1. Note the following:

> Q Did you contemplate the possibility of an insanity defense?

A Yes. There had -- I believe Mr. Windsor had already requested the court or previous to my appointment had requested the court for the appointment of a psychiatrist. There, in fact, were - I believe one psychiatrist and one psychologist, Doctor Corwin and Doctor Reichenberg that were appointed to represent Mr. Sullivan and I had the benefit of their reports, which, in my opinion, put an end to a thought of an insanity-type defense, especially in view of the fact that Mr. Sullivan took the position he did not participate in the crime.

Q What about that, was there something in the report that would negate that?

A There was a statement attributed to Mr. Sullivan in Doctor Corwin's report --

(Exhibit 1, Vol.II, p. 309, lines 6-22) In any event, when petitioner testified in his own behalf at trial, his counsel elicited most, if not all, of the pertinent data, sans psychiatric terminology, set forth in the doctors' reports that petitioner now claims should have been introduced in evidence. Note the following quoted from the transcript of state trial proceedings:

Q All right. Now, while you were working at Howard Johnson's in the Miami area, did you have any family problems at the time?

A Yes, I did.

Q What were the nature of those problems?

A Well, there were numerous problems. I would say that the first one was about four or five months after I began working for the Howard Johnson's Company and it is my parents are divorced. And my father had remarried. This had been something that had happened. He had been remarried for eight to 10 years and I was closer to his -- not to my mother, but to his second wife and she was dieing [sic] of cancer. And his nurse called me up and asked me if I could come up to New Hampshire.

* * *

Q All right. Are you originally adopted?

A Yes, I am

Q Are you a homosexual?

A Yes, I am.

Q Now, you indicated that Reid McLaughlin had some discussion with you in October of last year about coming to Miami. Did you accompany him to Miami at that time?

A No, I did not.

Q Did there come a time when you accompanied Reid McLaughlin to Miami?

A Yes, I did.

Q When was that?

A In March of this year, late March.

Q How did that trip happen to come about?

A Well, I had returned to New Hampshire because my father had suffered a paralyzing heart attack in June and he was unable to care for himself and he was alone and I returned to be with him at that time approximately two or three months after it happened. And, once he regained his composure and was able to take care of himself I made calls to friends I knew, to a friend I knew here in Miami and I placed two or more calls to this person and arranged for employment at the University of Miami at the Rathskeller.

(State court trial transcript, pp. 1453, 1455, 1456)

Again, petitioner's position is sought to be maintained on the theory of what his counsel did not do; however, respondents look to what counsel did do and his overall performance in representing petitioner to establish that he did render effective assistance. Respondents' appendix sets forth a thorough review of Mr. Dean's testimony as to what he did do in representing petitioner (RA 1-15); the expert testimony of Judge Gable and Judge Cowart (state trial judges); and all other testimony adduced at the hearing. Further, on the reports of the doctors, Raymond Martin Windsor testified that he too had explored the possibility of several defenses and requested a psychiatric report. He received the reports from Drs. Corwin and Reichenberg and stated that Dr. Corwin's report corroborated petitioner's

admitted responsibility in the matter. (RA 25) No wonder petitioner's counsel did not seek to introduce the reports in evidence at the sentencing hearing! Had he done so, it would have been egregious error particularly in view of petitioner's claim of absolute innocence.

Respondents submit that the focus in the instant case should be on the nature and source of the right to counsel afforded by the Sixth Amendment. We think the proper analysis should be based upon what counsel did and whether petitioner has been denied "a fundamental right essential to a fair trial," in the context of the entire proceeding. See, Gideon v. Wainwright, 372 U.S. 335, 339-344 (1963). As an essential premise to its analysis, the Gideon Court noted that in any due process inquiry the concern is whether in the totality of the circumstances the proceeding was fundamentally unfair. 372 U.S., at 339. In an unbroken line of decisions this Court has focused upon the fundamental denial of due process in the complete absence of counsel or in critical circumstances tantamount to the total denial of counsel.[2] Indeed, just recently this Court has held that the central consideration in an ineffective counsel claim is whether a defendant has been denied fundamental due process and a fundamentally fair trial. See, United States v. Frady, ___ U.S. ___, 102 S.Ct. 1584 (1982); Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558 (1982). It is submitted that the focus upon the fundamental nature of the right to counsel rather than laboring

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[2] See, Powell v. Alabama, 297 U.S. 45 (1932)(ability to confer); Avery v. Alabama, 308 U.S. 444 (1940)(ability to confer); Ferguson v. Georgia, 365 U.S. 570 (1961)(no direct examination of defendant); Hamilton v. Alabama, 368 U.S. 52 (1961)(no counsel at guilty plea); White v. Maryland, 373 U.S. 59 (1963)(same); Geders v. United States, 425 U.S. 80 (1970)(consultation with defendant); Brooks v. Tennessee, 406 U.S. 605 (1972)(defendant required to testify as first defense witness); Herring v. New York, 422 U.S. 853 (1975)(denial of closing argument); Faretta v. California, 422 U.S. 806 (1975)(no consent to counsel); Holloway v. Arkansas, 435 U.S. 475 (1978)(conflict of interest); Cuyler v. Sullivan, 446 U.S. 335 (1980)(same).

over a checklist of what should have been done is consistent with the proper application of the great writ and essential to finality. "A criminal trial concentrates society's resources at one 'time and place in order to decide within the limits of human fallibility, the question of guilt or innocence'." Engle v. Isaac, 102 S.Ct., at 1571. "Every trial presents a myriad of possible claims." Id. at 1574. It is inevitable that counsel will through strategy, ignorance, mistake, or many other reasons, choose to omit certain claims while pursuing others. Id. at 1572, n. 4; 1574-1575. The Constitution, therefore, could not reasonably require that counsel recognize and raise every conceivable claim. Id; Wainwright v. Sykes, 433 U.S. 72, at 91 (1977); Estelle v. Williams, 425 U.S. 501, at 512-513 (1976). In United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, at 1980 (1983), the Court observed that, "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial and that the Constitution does not guarantee such a trial." Due regard for finality supposes that a criminal trial must not be followed by a trial of a defendant's lawyer. See, Wainwright v. Sykes, at 114, n. 13 (Brennan, J., dissenting); See also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV.L. REV. 741 (1963). Such a practice, "degrades the prominence of the trial itself." Isaac, 102 S.Ct., at 1571. It is submitted that the underlying purpose of the great writ is, "a bulwark against convictions that violate 'fundamental fairness.'" Isaac, 102 S.Ct., at 1570. Reasonably, any reexamination of counsel's performance must be guided by the polar star of fundamental fairness.[3]

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[3]This analysis is also compatible with the original purpose of the writ at common law to correct only fundamental error. See, Ex Parte Bollman, 8 U.S. (4 Cranch) 75, at 95 (1807)(Marshall, C.J.); J. Story, Commentaries on the Constitution of the United States, 157 (1883); McFeely, The Historical Development of Habeas Corpus, 30 S.W.L.J. 585 (1976).

As stated by the Eleventh Circuit:

> Each case turns on its own facts and the effectiveness of counsel must also be judged on the facts and conduct of those involved in each case. Goodwin v. Balkcom, at 804. We have carefully reviewed counsel's performance during the penalty phase, in light of the totality of the circumstances as they were known to counsel at that time, and find that counsel's performance did not fall below the "reasonably effective assistance" standard.

Sullivan v. Wainwright, 695 F.2d 1306, at 1309 (11th Cir. 1983). Respondents submit that the record demonstrates that petitioner received a fair trial, consequently he received constitutionally adequate representation. The Constitution requires no more.

ISSUE II

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT IT WAS BARRED FROM CONSIDERING THE MERITS OF PETITIONER'S CLAIMS REGARDING JURY INSTRUCTIONS ON THE BASES OF (1) PROCEDURAL DEFAULT AND (2) FAILURE TO SATISFY THE "CAUSE AND PREJUDICE" REQUIREMENT OF Wainwright v. Sykes, 433 U.S. 72 (1977).

Even though the Eleventh Circuit admitted that all of petitioner's claims relating to jury instructions were barred by Wainwright v. Sykes, 433 U.S. 72 (1977), and Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), and that petitioner "ha[d] not advanced the Sykes issue nor has he advanced any cause for the procedural default nor proffered any prejudice resulting therefrom," the court nevertheless considered whether the requirements of Sykes and Isaac had been met. 695 F.2d, at 1310. Relying on the "novelty of [the] constitutional claim," the court assumed that the cause prong of Sykes had been met and then proceeded to determine the existence vel non of prejudice. Relying on United States v. Frady, 456 U.S. 152, 167-68 (1982), quoting, Henderson v. Kibbe, 431 U.S. 145, 154 (1977), the court concluded that "the lack of showing of actual prejudice under Sykes bars our consideration of the merits of Sullivan's claims regarding the jury instructions." 695 F.2d, at 1311.

However, petitioner now argues that a reasonable juror could have understood the instructions in a constitutionally impermissible way. And, if a reasonable juror "could have understood" the instructions in such an impermissible way, then petitioner wants this Court to assume that the jurors did misunderstand the instructions. Not only is this precise issue barred from consideration by Picard v. Conner, 404 U.S. 270 (1971), the most compelling demonstration of error in the assumption petitioner asks this Court to make is a comparison with the seminal decision in United States v. Agurs, 427 U.S. 97 (1976). The Agurs Court in assessing the effect of new evidence consisting of discovery material upon a claim for new trial, clearly delimited claims of constitutional error thusly:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

427 U.S., at 109-110. Consistent with Agurs, see Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970), and United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982). Respondents submit that the "heavy burden" standard in Agurs and the "outcome" analysis of the foregoing authorities are totally consistent with the policy and underlying philosophy in collateral proceedings noted in Frady and are the central motivation for the rule in United States v. Decoster, (Decoster III), 624 F.2d 196 (D.C.Cir. 1979), and Knight v. State, 394 So.2d 997 (Fla. 1981). See also, United States v. Hasting, ___ U.S. ___ 103 S.Ct. 1974 (1983), and the Fifth Circuit's discussion of the Florida death penalty statute in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.denied, 440 U.S. 976, citing the language in this Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976), rejecting the contention that the Florida statute (§ 921.141) contained limiting language with respect to mitigating circumstances that the judge and jury could

properly consider. Spinkellink, 578 F.2d, at 620, 621. Equally informative is the magistrate's treatment of this issue in her review and recommendation. Please see P.A. 99a-104a.

Petitioner's contention that the trial judge relied on a nonstatutory aggravating circumstance was rejected by the court below. Sullivan, 695 F.2d, at 1312. Indeed, the coup de gras to petitioner's "lack of remorse" argument is the decision of this Court in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983). Still, what petitioner fails to point out, perhaps intentionally so, is that at the time of his trial in November, 1973, and even at the time the Florida Supreme Court affirmed his conviction and sentence in November 1974, the use of nonstatutory aggravating factors had not been condemned by the Florida Supreme Court. It was not until Purdy v. State, 343 So.2d 4 (Fla. 1977), was decided that the use of aggravating factors was restricted to those enumerated in the statute. Purdy was decided March 25, 1977, more than two years subsequent to the decision of the Florida Supreme Court in Sullivan v. State, 303 So.2d 632 (Fla. 1974), on November 27, 1974.

The decision in Sireci v. State, 399 So.2d 964 (Fla. 1981), is informative. There, the court remarked as follows:

> The defendant further argues that the state presented evidence to the jury of a nonstatutory aggravating factor: the defendant's lack of remorse. The trial judge did not find "lack of remorse" as an aggravating factor. While lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert.denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 ( ), the fact that the defendant allegedly stated "I don't feel no different," constituted part of the equation which went into the finding of "heinous, atrocious, and cruel." Similarly, in Hargrave v. State, 366 So.2d 1 (Fla. 1978), the statements of the defendant that he had killed before and it would not bother him to

> kill again were considered as applicable to a consideration of whether or not the aggravating factor "heinous, atrocious, and cruel" was present beyond a reasonable doubt. In both of these cases the death sentence was upheld. In the case sub judice the trial court clearly did not consider "lack of remorse" as a separate aggravating factor.

Id. at 971, 972. It is respondents' position that the trial judge never considered "lack of remorse" as an aggravating factor. It was nothing more than an observation of Sullivan's demeanor in the courtroom equally observable by the jury. This conclusion is supported by the fact that Justice Overton in his specially concurring opinion said nothing about lack of remorse being one of the aggravating factors considered by the trial judge. 303 So.2d 637, 638. But assuming arguendo that the trial judge did consider petitioner's lack of remorse, he was entitled to do so under the rationale of Sireci, supra, because it was a factor which went into the equation of whether or not the crime was especially heinous, atrocious, or cruel.

As stated earlier, the issue is precluded by Sykes and Isaac but it is interesting to note that it is also meritless.

ISSUE III

> WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR WAS PROPERLY APPLIED TO PETITIONER'S CASE.

Petitioner's argument on this point is totally devoid of merit and was deemed unworthy of comment by the lower court. In Spinkellink v. Wainwright, supra, the Fifth Circuit reasoned:

> If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusions would be no more, nor no less, accurate. Such is the human condition. Cf. Stone v. Powell, 428 U.S. 465, 493 n. 35, 96 S.Ct. 3037, 3051-3052 n. 35, 49 L.Ed.2d 1067 (1976)(condemning the respondents' "basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights.").

> The Supreme Court in Proffitt, or in Furman, Gregg, Jurek, Woodson, or Roberts, could not have intended these results. We understand these decisons to hold that capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty--so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute--and there can be no doubt that Florida has--which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed.

Id. at 605.

Petitioner simply contends that the crime for which he was convicted was not heinous, atrocious and cruel and attempts to support this thesis by later case law. Respondents point out that this identical situation has been held to be especially heinous, atrocious, or cruel in three cases subsequent to Sullivan v. State, 303 So.2d 632 (Fla. 1974). See Knight v. State, 338 So.2d 201 (Fla. 1976); Douglas v. State, 328 So.2d 18 (Fla. 1976); and Jackson v. State, 366 So.2d 752 (Fla. 1978).

It is true that not all "execution-type slayings" are heinous, atrocious, or cruel within the meaning of Florida's death penalty statute. For example, see Riley v. State, 366 So.2d 19 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), and Menendez v. State, 368 So.2d 1278 (Fla. 1979). But there are those cases where the execution-type slaying of a victim does come within the meaning of this aggravating circumstance. Petitioner's case is one of them. The cases relied upon by petitioner are factually distinguishable, in that there was no kidnapping and taking to a secluded area while the victims suffered, knowing, or at least anticipating, that they were to be executed. Indeed, this Court is invited to review the facts of the crime in Spinkellink, 578 F.2d, at 586. Note the following:

The trial jury recommended that Spenkelink receive the death penalty. The trial court agreed. Pursuant to Fla.Stat.Ann. § 921.141(3), it found that the felony "was committed for pecuniary gain, either for another person's money or to re-coup his own," that the crime "was especially heinous, atrocious and cruel," that Spenkelink "was previously convicted of a felony involving the use, or threat of violence to another, to-wit: armed robbery," and that Spenkelink committed the crime while "under sentence of imprisonment." The only mitigating circumstance found by the trial court was "that possibly the defendant was under the influence of extreme mental or emotional disturbance," a consideration which, "based on the record as a whole," the court did not regard "as a substantial factor." See Fla.Stat.Ann. §§ 921.141(5), (6). The Supreme Court of Florida affirmed both the conviction and sentence. Spinkellink v. State, 313 So.2d 666 (Fla.1975), cert.denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). With respect to the sentence of death, the Florida Supreme Court stated:

> As more fully set out above the record shows this crime to be premeditated, especially cruel, atrocious, and heinous and in connection with robbery of the victim to secure return of money claimed by Appellant. The aggravating circumstances justify imposition of the death sentence. Both Appellant and his victim were career criminals and Appellant showed no mitigating factors to require a more lenient sentence.

313 So.2d at 671. The United States Supreme Court denied certiorari. Spenkelink v. Florida, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976).

* * *

Finally, in responding to the argument that Section 921.141's eighth aggravating circumstance was unconstitutionally vague and overbroad, the Court in Proffitt even mentioned the case of petitioner Spenkelink:

> The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, e. g., Hallaman v. State, 305 So.2d 180 (1974)(victim's throat slit with broken bottle); Spinkellink v. State, 313 So.2d 666 (1975)("Career criminal" shot

> sleeping traveling companion); Gardner v. State, 313 So.2d 675 (1975)(brutal beating and murder); Alvord v. State, 322 So.2d 533 (1975)(three women killed by strangulation, one raped); Douglas v. State, 328 So.2d 18 (1976) (depraved murder); Henry v. State, 328 So.2d 430 (1976)(torture murder); Dobbert v. State, 328 So.2d 433 (1976)(torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.
>
> 428 U.S. at 255 n. 12, 96 S.Ct. at 2968 n. 12 (opinion of Stewart, Powell, and Stevens, JJ.)(emphasis added).

Id. at 588, 589, 602. See also the discussion in Moore v. Balkcom, 709 F.2d 1353, 1358-1360 (11th Cir. 1983). It is submitted that the construction placed upon the aggravating circumstance "especially heinous, atrocious, or cruel" by the Florida Supreme Court in Sullivan, Knight, Douglas, and Jackson constitute an authoritative construction of a state statute which should be binding on this Court. Wainwright v. Stone, 414 U.S. 21 (1973); Miller v. California, 413 U.S. 15 (1973); Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960).

The foregoing can be of academic interest only because the alleged "unconstitutional application of the 'especially heinous, atrocious and cruel factor'" (Petition, p. 31) was never raised in the trial court and not challenged on petitioner's direct appeal. The procedural default is clear and Sykes and Isaac preclude consideration here. Interestingly, petitioner tacitly admits (Petition, p. 27) that this issue was only raised in state post-conviction proceedings and in federal habeas. See Palmes v. State, 425 So.2d 4, 6 (Fla. 1983).

ISSUE IV

WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE REFERENCE TO A POLYGRAPH TEST BY A STATE WITNESS WHICH WAS DEEMED HARMLESS ERROR UNDER STATE LAW DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL OR FEDERAL LAW COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING.

After reviewing what three lower courts held on this issue, petitioner says that "[e]ach court erred." (Petition, p. 34) More interesting is petitioner's allegation that the lower court "could not even find the federal issue." (Petition, p. 34) There is a reason for this; there was none to be found!

The Florida Supreme Court in view of the overwhelming evidence of guilt held that as a matter of state law the polygraph reference was harmless, citing to Coral Gables v. Levison, 220 So.2d 430 (Fla.3d DCA 1969), and Gagnon v. State, 212 So.2d 337 (Fla.3d DCA 1968). Sullivan, 303 So.2d 635, n. 2. The court reasoned as follows:

> We cannot know how the jury construed his answer, or what weight was given to it; therefore, to assert that it was construed as meaning he had already passed it would be pure speculation on our part. Reversible error cannot be predicated on conjecture. Singer v. State, 109 So.2d 7 (Fla. 1959).
>
> * * *
>
> Without passing on the issue of whether the question on cross-examination concerning the relationship between the outcome of McLaughlin's testimony and his eventual sentence opened the door to a reference to the polygraph test condition of his plea bargain (the State contending that this was proper rehabilitation of the witness, in the nature of a showing that the State had good reason to attach credibility to his testimony), we observe that the evidence of appellant's guilt, including both the testimony of McLaughlin (a participant in the homicide) and appellant's prior confession is so overwhelming that we cannot say that this one utterance caused a miscarriage of justice which would necessitate a reversal of the conviction. We conclude that, under the peculiar circumstances presented here, the trial court did not commit reversible error in denying appellant's motion for mistrial.

Id. at 636. (Emphasis ours.) Justice Overton (concurring specially) cited Harrington v. California, 395 U.S. 250 (1969), Milton v. Wainwright, 407 U.S. 371 (1972), and Schneble v. Florida, 405 U.S. 427 (1972), for the proposition that where independent evidence of guilt is overwhelming, a constitutional error can be rendered harmless. Respondents point out that two of the three state decisions cited by the Florida Supreme Court as authority for its holding predates the decisions of this Court in Harrington, Milton, and Schneble. In fact no citation to federal authority is to be found in the opinions handed down in the state court decisions relied upon by the Florida Supreme Court for its holding of harmless error.

Just recently in Michigan v. Long, ___ U.S. ___, 33 Cr.L. Rptr. 3317, this Court had occasion to discuss its jurisdiction where the decision for which review is sought rests on an adequate and independent state ground. The Court remarked in pertinent part as follows:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

The focus of Justice Stevens' dissent was on the Court's decision to presume that adequate state grounds are intended to be dependent on federal law unless the record plainly shows otherwise. The dissent points out that if the intermediate approaches are rejected, the Court is then left with a choice between two presumptions: one in favor of taking jurisdiction, and one against it. Precedent shows that the latter presumption has always prevailed. In support of this thesis, Justice Stevens quotes from Lynch v. New York, 293 U.S. 52 (1934):

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arquimbau, 198 U.S. 149, 154, 155; Johnson v. Risk, [137 U.S. 300, 306, 307]; Wood Mowing & Reaping Machine Co. v. Skinner, [139 U.S. 293, 295, 297]; Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 599; Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300, 302, 304." 293 U.S., at 54-55.

Id. at 3327.

In an attempt to get a foot inside the door, petitioner in his argument under this point presents an issue that was never precisely presented to any of the lower courts. In all of the courts below the issue was simply whether the polygraph reference constituted harmless error. Now, for the first time, it is contended that the state prosecutor's "deliberate manipulation of the evidence" violates due process standards. (Petition, p. 36.) This is in direct violation of Picard v. Conner, supra, and barred from consideration by this Court by Sykes and Isaac.

In concluding under this point, it deserves mention that this Court has already rejected petitioner's argument on the polygraph issue. See the Petition filed in this Court in Sullivan v. Florida, 428 U.S. 911 (1976).

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

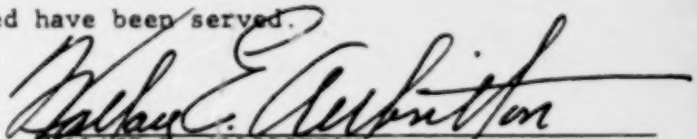
By
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENTS

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 1983, a copy of this Brief for Respondent in Opposition was mailed, postage prepaid, to Mr. Roy E. Black, 1300 Miami Center, 100 Chopin Plaza, Miami, Florida 33131. I further certify that all parties required to be served have been served.



WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

5-5-80

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ROBERT A. SULLIVAN,

Petitioner,

-v-

CASE NO. 79-2721-Civ-JAG

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections; and DAVID H. BRIERTON, Superintendent of Florida State Prison at Starke, Florida,

Respondents.

RESPONDENTS' MEMORANDUM BRIEF

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENTS
The Capitol
Tallahassee, Florida 32301

(904) 488-0290

Respondents' Appendix

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PRELIMINARY STATEMENT

The record is in four volumes. However, Volumes II, III, and IV are bound in two volumes each, making a total of seven separately bound volumes. The record volumes are consecutively paginated and references thereto will be made by the symbol "R" followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

This cause was initiated by the filing of a petition for writ of habeas corpus in this court on June 21, 1979. Following the filing of subsequent pleadings and the issuance of an order dated February 12, 1980, this cause came on for hearing on March 6, 1980 before the Honorable Patricia Jean Kyle, United States Magistrate.

Dennis Allen Dean, Sr., was called as a witness for petitioner (R 248). Mr. Dean testified that he was appointed to represent petitioner on October 4, 1973. Mr. Dean on direct examination basically outlined the things he did do in his representation of petitioner (R 248-282). On cross-examination, Mr. Dean testified as to his legal education

and experience (R 298-302). The first time that Dean saw petitioner was at a suppression hearing and he (Dean) formed the opinion then that petitioner would be a difficult witness to present to a jury (R 303). After being appointed to represent petitioner, the first thing Dean did was to have a lengthy meeting with petitioner and secure the files and depositions from Ray Windsor and Carling Stedman (R 304, 305). It was Dean's opinion that the state had an extremely strong case against petitioner (R 306). Part of Dean's trial strategy was to develop error and make the most of it on a subsequent appeal (R 307). Dean testified that it was difficult to get petitioner to think in a cohesive manner as he wanted certain things brought up that Dean felt had no relevance to the defense theory of the case (R 308). Dean had occasion to contemplate the use of possible affirmative defenses such as insanity. However, after reviewing the reports of Drs. Corwin and Reichenberg, the theory of an insanity-type defense was discarded (R 309). Counsel for petitioner agreed that there was no basis for an insanity defense (R 311). The defense of intoxication was considered but was discarded because it was believed that same was insufficient for the purpose of attacking the voluntariness of petitioner's confession (R 312, 313). The defense of self-defense was considered but this would have been inconsistent with petitioner's claim that he had nothing to do with the crime and was not even at the scene (R 313, 314). An effort was made to develop an alibi defense through the use of a court-appointed investigator. But this met with no success because the alibi defense could not be pinpointed with specificity and there was no corroboration by independent witnesses (R 314). Other matters were considered such as coercion but not discussed with petitioner (R 315).

After formulating the decision to proceed with the basic defense of trying to create some form of reversible error, Dean had the benefit of twenty four depositions that had already been taken in the case and he rescheduled many of the depositions (R 316). In other words, Dean stated that it was his belief that certain witnesses were crucial to the state's case and he wanted to redepose them to get more statements on record for a possible later contradiction (R 317). Dean also had the benefit of the transcript of the motion to suppress which was a three or four hour hearing (R 317). All of the depositions were introduced in evidence as a composite exhibit, Defendant's (respondents') Exhibit 13 (R 318). At all of the depositions taken by Dean, with the exception of one, petitioner was present (R 319). Dean wanted petitioner present to hear what those witnesses were to testify and also to have him available to feed him any questions that petitioner thought should be asked. Dean then narrated other factors that he did in preparation for trial (R 320, 321). Petitioner was given an opportunity to review his prior testimony at the motion to suppress and other depositions were made available to him so that he could prepare himself for trial (R 322). Because of extensive pretrial publicity, Dean filed a motion for change of venue but Judge Cowart deferred ruling on it for the purpose of seeing if a jury could be chosen (R 323). Dean made an opening statement and prepared for closing argument. Of course, this preparation for closing argument was modified as the trial progressed (R 324). Dean explained the jury selection process to petitioner (R 325) and during the process of selecting the jury petitioner never indicated any dissatisfaction with the manner in which Dean was conducting same (R 326).

At no time during the trial did petitioner ever indicate that he was dissatisfied with the way Dean was conducting himself in the presentation of petitioner's defense (R 327). Petitioner expressed no dissatisfaction with Dean's representation during the sentencing phase of the trial (R 328). Dean filed a motion for new trial and then subsequently handled the appeal to the Florida Supreme Court. At no time during the pendency of the appeal did petitioner express any dissatisfaction with Dean's representation of him at the trial level (R 329). The next thing that Dean did for petitioner was to secure an order from the United States Supreme Court staying execution of sentence (R 329). Dean filed a petition for writ of certiorari in the United States Supreme Court which was subsequently denied in July of 1976. Incidentally, petitioner was in court when Judge Cowart appointed Dean as a special public defender for purposes of appeal. At this time, petitioner made no objection whatsoever to Dean's continuing representation of him for purposes of appeal (R 331). Dean stated that over a period of time he had received numerous letters from petitioner indicating his satisfaction with his (Dean's) representation.

In January of 1977, Dean appeared on behalf of petitioner at the Parole Commission hearing. This was at petitioner's request (R 337). At the time Dean appeared before the Parole Commission in petitioner's behalf he had already received information from various sources that petitioner had, in fact, committed the crime (R 338). In the latter part of March 1977, Dean appeared before the cabinet to plead for mercy at the Clemency Board hearing (R 339). This also was done at petitioner's request (R 340). After having done everything that he could in petitioner's behalf, Dean began communicating the idea to petitioner that it would be a good idea if he got a new attorney (R 340). It was during this period of time that Dean discussed with

petitioner the possibility of post-conviction relief motions. As a possibility of getting back into court and getting the appellate process started all over again, Dean indicated the possibility of making the claim of ineffective assistance of counsel at the motion to suppress hearing. During all of this time, petitioner never indicated any dissatisfaction with Dean's representation (R 341). Neither did petitioner directly or through any third party indicate any dissatisfaction with Dean's representation either at the trial or appellate level (R 341). The first time Dean received any indication that petitioner was dissatisfied with his representation was when the 3.850 motion was filed in Circuit Court before Judge Gable.

Mr. Dean stated that he had had occasion to review the allegations alleged by petitioner against him in the 3.850 motion and in the habeas before this court. Dean then explained as best he recalled why the trial date was changed from November 26, 1973 to the first week of November 1973. Dean stated that he moved for a continuance which was denied. In explaining why this was done, Dean frankly stated that he never wanted to try the case if he could avoid it. In fact, any delay that could have been secured could have been only beneficial for the defense (R 349). Dean stated that the motion could possibly be characterized as frivolous and that it was filed with the hope of delaying the trial. Petitioner was aware that Dean was going to make the motion for continuance and the reasons therefor (R 350). Dean stated that he was prepared for trial; that he had done everything that he could do (R 350, 351). Dean further stated his reasons for believing that it was useless to try to make Frank Barden a suspect (R 352, lines 7-17). Certain matters were stipulated for

the purpose of avoiding the use of 8 x 10 color photographs of the victim. Consequently, Dean stated that if there was no contest as to the cause of death then it would be best to avoid the state having to use gruesome, prejudicial photographs (R 353). Dean stipulated as to the manner, cause, date, and time of death in order to avoid prejudicial testimony coming out before the jury (R 354). All of this was discussed with petitioner who was present at the pretrial conference. Again, the stipulations entered into by Dean were made with the approval of petitioner (R 356). Further, Dean explained the strategy of avoiding Dr. Beamer's testimony and petitioner indicated no disagreement with Dean's tactics (R 357).

Dean also wanted to avoid the victim's wife from testifying as he believed this would have been prejudicial and petitioner agreed (R 357, 358).

As to why no plaster casts were taken of any footprints, Dean testified that there were no identifiable prints that could have been attributed to anybody (R 360). Dean further testified that he requested no laboratory analysis of the tire iron because same had been wiped off or wiped clean. After all, Dean stated that the tire iron was found in petitioner's car and he assumed that petitioner's fingerprints would have been on it. Petitioner never denied the ownership or existence of the tire iron.

Dean next explained concerning the alleged failure to investigate the potential of any latent prints on the adhesive tape with which the victim was bound (R 362). According to Ron Shuk, those prints appeared to be palm prints and were on the sticky side of the tape and could not, in Shuk's opinion, be identified to petitioner or

anyone else. Shuk, according to Dean, testified that it was his opinion based on the position of the tape that the prints found thereon were the victim's prints (R 363). Dean had no information in his possession that he could have given to anybody for the purpose of having Shuk make a print comparison (R 364).

Next Dean explained that he knew of a Gilbert Jackson. This person was in the car at the time petitioner was arrested on April 17, 1973. Petitioner never indicated that he felt that Mr. Jackson would have anything to say that would be relevant to the case. In fact, Jackson had only been in Miami a few days and was not there when the murder allegedly took place (R 365, 366). Dean stated that he did not file a motion for rehearing on the suppression issue because he was satisfied from an appellate standpoint with the trial judge's denial of the motion (R 366). Dean reviewed the testimony of the suppression hearing and was satisfied that Mr. Windsor and Mr. Bronis had made a proper record for appellate purposes and there was no need to supplement that record in any fashion whatsoever (R 367). Dean explained the efforts made to locate a Thomas Murphy. This was an individual that petitioner had met at Keith's Bar whom petitioner said was a lawyer from Boston. On the night of the arrest, petitioner claimed that he had asked the police to go back to the bar and contact Mr. Murphy so he could have the benefit of counsel. Petitioner said the police refused so to do. The police denied knowledge of this type of conversation. Dean checked through Martindale-Hubbell and was unable to locate a Thomas Murphy as an attorney in Boston or anywhere in Massachusetts. Petitioner had absolutely no information other than this man was supposed to be an attorney from Boston. Dean was unable to locate Mr. Murphy and until this date no one has been successful in

finding this gentleman (R 368).

Dean next explained that he could see no relevance to any testimony of a state highway patrolman who allegedly passed by the vehicle in which the victim was held prior to the murder. Dean pointed out that there was testimony in petitioner's confession that while he and Reid McLaughlin were driving the victim around on the Tamiami Trail, at one point they stopped the car. The victim was taken into the woods or an area off the road and while they were there petitioner saw a Florida Highway Patrol car drive by. Dean pointed out that for him to try to corroborate what petitioner had said in his confession didn't make a whole lot of sense (R 369, 370).

Dean again explained why he was unable to impeach Frank Barden because he had not been adjudicated guilty. In spite of this, Dean stated he still attempted to perfect the record for purposes of appeal. In fact, Dean kept plodding in this area until Judge Cowart got upset with him and told him he had better quit (R 370, 371).

Dean stated that he did not present any legal argument in support of judgment of acquittal made at the conclusion of the state's case because it wasn't necessary to do so in order to preserve the record. Dean stated that at that point in time trying to convince the judge that a prima facie case had not been established would have been ludicrous. Dean pointed out that the state on appeal was unable to say that any of the issues presented had not been appropriately preserved for appellate review (R 372).

In answer to the accusation that he did not submit any written jury instructions, Dean pointed out that proposed jury instructions were prepared and submitted to him. He reviewed them and was satisfied with them (R 372). There

were proposed instructions that Dean objected to which were not given but Dean stated that he was satisfied with the overall instructions (R 373).

In answer to the accusation that Dean inappropriately emphasized that petitioner was a homosexual, Dean stated that he did bring this to the jury's attention as early as voir dire. This was done not only with petitioner's approval but pursuant to his instruction (R 374). In fact, Dean stated that two jurors were excused for cause because this area was explored. Again, Dean stated it was petitioner's idea initially to bring out the fact that he was a homosexual. One reason for this was that petitioner might gain some sympathy from the jury because of that fact (R 375). Defendant's Exhibit 1 for Identification was a list of handwritten questions prepared by petitioner and the very first question thereon related to petitioner's being a homosexual (R 376). This list of questions was introduced in evidence as Respondent's Exhibit 1 (R 377).

Mr. Dean next described the events leading up to a polygraph examination being administered to petitioner by Warren Holmes (R 377-380). Dean stated that petitioner never at any time after the administration of the polygraph examination claimed that Mr. Holmes was lying and that he had not made any of the admissions alleged in the polygraph report (R 380, lines 9-13). Dean recited Holmes' reputation as a polygraph examiner (R 381) and further stated that petitioner never indicated that there was anything wrong with what transpired during the pretest interview (R 382). Dean again repeated that from the time he was appointed until the date of the trial, he had adequate time to prepare the case for trial (R 383, 384).

On redirect examination, counsel for petitioner quoted out of context a portion of a letter dated February 5, 1974 from Dean to petitioner and asked if Dean didn't think that such statement would have a chilling effect on petitioner expressing dissatisfaction with him over any part of the case. Dean answered in the negative (R 389, 390). Further, Dean denied that whether or not there was blood on the tire iron would be of any significance in refuting the testimony of Reid McLaughlin (R 392). Dean pointed out that he didn't know that the tire iron found in the car was attributed to being the tire iron that petitioner supposedly used (R 392). Dean pointed out that several things were admitted in evidence by Judge Cowart for whatever relevancy the jury wanted to give it but that he did not recall McLaughlin saying that it was the same tire iron. Dean explained that he was satisfied in utilizing the evidence, the adhesive tape used to bind the victim, once Mr. Shuk had said he compared the palm print thereon to that of petitioner and it wasn't petitioner's prints nor McLaughlin's prints. Dean explained that he used this in closing argument that since the print on the adhesive tape was not identifiable to either McLaughlin or petitioner, this was consistent with the defense theory that there was a third person involved in the case (R 395). On recross examination, Dean explained the remarks in his letter that petitioner's counsel had inquired about on redirect examination. Please see Dean's testimony at R 398, line 16--R 399, line 6.

On direct examination, it was brought out that in the sentencing phase of the trial Judge Cowart had made the observation that he had observed not one scintilla of remorse displayed by petitioner. Dean was asked if he made any objection to Judge Cowart making a finding that

that was an aggravating circumstance. Dean answered in the negative. Dean then explained that he did not interpret the language of Judge Cowart as finding that the "lack of remorse" was an aggravating circumstance but rather merely an observation (R 260, 261).

Further, on direct examination, Dean was asked questions relating to his cross-examination of Frank Barden, a former manager of the Howard Johnson's Restaurant from which the victim was abducted (R 262, 263). Dean stated that he could not impeach Barden on the basis of a prior conviction of crime because Barden had pled guilty to the crime and adjudication was withheld and he was placed on probation. Consequently, Dean explained, he could not ask Barden if he had ever been convicted of a crime because he, in fact, had not. Dean stated that this notwithstanding he did try to go into the embezzlement and the fact that Barden had fled to Las Vegas and had been picked up there. At this point, Judge Cowart precluded him from going any further into it (R 263). Dean testified that he was satisfied based on his own interpretation of the law that he could not ask Barden the question of whether he had ever been convicted of a crime. There was no trial strategy involved in this; it was a matter of Dean's interpretation of the law (R 264, 265). Dean stated that he had no recollection of filing a motion attacking the composition of the grand jury (R 265). Dean stated that he was satisfied that he had ample time to prepare for the penalty phase of the trial. Subpoenas for six or seven witnesses had been issued and he ended up presenting the testimony of five witnesses (R 268). Dean testified that on the morning of the sentencing phase of the trial, he received Mr. Holmes' polygraph report which disturbed him (R 268, 269). Dean emphasized that although the report may have affected

him personally it did not affect his argument to the jury (R 269, 270).

Dean stated that he was familiar with the case of Witherspoon v. Illinois and was familiar with it in 1973. Counsel for petitioner asked Dean why he did not object to prospective juror Hammiel being excused by the court. Dean explained that his failure to object could have been for one of two reasons: one, he was satisfied from the answers given that the juror met the Witherspoon criteria, and the other was that he didn't want the prospective juror to serve (R 272, 273). Dean was then asked if there was any trial strategy involved in not objecting to prospective juror Hammiels being excused (R 273). Dean explained: "At this time, looking solely at the cold record, I can't tell you why I didn't object to the Court excusing this juror. I can tell you that I didn't want her for whatever reasons. If I wanted her, I would have objected and pursued the matter." (R 274, lines 1-5)

When asked if petitioner ever sent him any names of alibi witnesses, Dean answered that he didn't know if you could characterize them as alibi witnesses. This would be particularly true of the witness Thomas Murphy. Dean stated that Mike the bartender had been contacted by the investigator and confirmed the fact that petitioner was in the lounge almost every night but could not pin it down to any specific time periods such as would be required under the alibi statute (R 274, 275). Dean explained that petitioner was adamant about wanting to take a polygraph test (R 276). A motion was presented to Judge Cowart for this purpose which was granted. Petitioner was transported to the office of Warren Holmes for the purpose of the polygraph. Dean further stated

there was never any discussion with Holmes about the polygraph and that he had no contact at all with Holmes as far as he could recall (R 277).

When asked if he ever entertained the opinion that Mr. Windsor had given petitioner ineffective assistance of counsel at the motion to suppress hearing, Dean explained as follows:

> A No, sir. Now, let me explain, because I know what the follow-up question is.
>
> Near the end of the time when I had made the decision to withdraw from further representation of Mr. Sullivan for various reasons, he had written me and asked if there was any - what possible arguments or avenues were open to him at that point in time. This was in, I believe, 1977 or possibly 1978. This was after I had handled the appeal to the Florida Supreme Court, after I had handled a motion for post-conviction relief before Judge Cowart; after I appeared before the Probation and Parole Commission at Raiford; after I appeared before the Governor and Cabinet in Tallahassee and after I had filed a lawsuit in Tallahassee against the Governor and the Cabinet. All of those things had been explored without success.
>
> I told Bob that I would review the transcript and see if there was any suggestions I could give to him or to whoever his new counsel may be.
>
> In reviewing the transcript, I went over the whole transcript again and as I did, I noticed that at the motion to suppress it appeared that Ray Windsor, who was representing him at the time, took the burden or accepted the burden at the motion. There was some Florida case law at the time that indicated the State has the burden on a motion to suppress hearing.
>
> As giving Mr. Sullivan the possibility of something to argue that had not been previously argued, I suggested that the possibility might lie with an ineffective assistance of counsel motion alleging that Mr. Windsor improperly accepted the burden at the motion to suppress hearing.
>
> (R 279, 280)

At the beginning of Dean's cross-examination by Mr. Adorno it was brought out that petitioner had instructed Dean to retain certain letters and the polygraph examination and not to turn those items over to new counsel that he (petitioner) might obtain (R 282). The reason for this, so

Dean testified, was that petitioner did not want to compromise his position with any new counsel that might be appointed to represent him. Dean was then asked if petitioner had ever explained to him what he meant by compromising himself with his new attorney. At this time, there was an objection based on the attorney-client privilege (R 283) which was overruled by Judge Kyle (R 286, 287). Dean then answered that petitioner had indicated that he wanted to avoid the possibility of a conflict situation as had existed between himself and Mr. Windsor which resulted in Mr. Windsor's withdrawal from the case (R 288). When asked if petitioner ever explained what this conflict was, Dean stated as follows:

> A He indicated in the correspondence that at one point he apologized for not having been completely open with me and - I can't remember the terminology, something like having played games or fibbed - fibbed was his word, but he was sure that I understood why he had done it and it was to avoid the situation that he had with Mr. Windsor.
>
> Q That is, that he told Mr. Windsor he had committed the crime?
>
> A And, then, wanted to testify denying it.
>
> Q Mr. Windsor indicated to him that he would not put him on the stand and suborn perjury?
>
> A That's my understanding, yes.
>
> (R 289)

Dean identified Defendant's Exhibit 5 for Identification (R 291) and stated that it was a letter received by him from petitioner dated March 14, 1974. It was a piece of correspondence in which petitioner referred to his prior conflict or compromising situation with Mr. Windsor. Dean was then asked if he interpreted a certain portion of this letter as an admission by petitioner to Mr. Windsor that he committed the crime (R 292). Dean answered in the affirmative (R 293). Dean was then asked how he interpreted that portion of the letter, Defendant's Exhibit 5 for Identification, which was underlined. Dean answered that it was

his interpretation of that portion of the letter that petitioner had committed the crime but had intentionally not told him of this fact (R 295). Dean was then asked if there was anything in the report submitted by Warren Holmes that led him to develop the interpretation he had just voiced with respect to Defendant's Exhibit 5 for Identification. Dean answered that the statements made in the polygraph report tied into what petitioner stated in his letter of March 14, 1974 (R 297). Dean then identified Defendant's Exhibit 10 and 8 for Identification as letters received by him from petitioner and stated that both of those letters had reference to petitioner asking him to retain certain letters and the polygraph examination and not turn them over to any new counsel (R 298).

Judge Ellen Morphionios Gable was called as a witness by the respondents (R 56). Judge Gable stated her judicial background and then in answer to questions propounded by counsel for respondents testified as to her reasons for not having petitioner present at the state court hearing on petitioner's 3.850 motion. She testified that in view of the extensive affidavit filed by petitioner and the security risk involved that she ruled petitioner would not have to be present at the hearing. She testified that she read the affidavit in its entirety and took it into consideration in making the ruling (R 58, 59). Judge Gable further testified that she had ruled on the effective assistance of counsel issue and held that petitioner had been supplied "completely adequate assistance of counsel." (R 60) Judge Gable testified that she was familiar with Mr. Dean's reputation as an attorney and that she would have appointed him as a special public defender on any given case because "he's an excellent lawyer." (R 60) Further, she stated that

his reputation was excellent (R 61). On redirect examination, the following occurred:

> Q Since you took the affidavit at its face value, not subject to cross examination by the State, would you have also taken into consideration any letters written by the Defendant that Mr. Black, if he saw fit to introduce for you to take into consideration?
>
> A Sure. I thought I made it clear that I would consider anything and all that Mr. Sullivan wanted to present to me in writing, but I wasn't going to have him brought back.
>
> (R 70)

Judge Edward D. Cowart (R 71) was called as a witness by the respondents and after stating his educational, professional, and judicial background testified that it was his opinion that Ray Windsor was a very well qualified, very competent young lawyer, very studious young lawyer (R 76). Judge Cowart stated that there was nothing in his recollection that would lead him to believe that petitioner received ineffective assistance of counsel from Mr. Windsor during the motion to suppress. To the contrary, he stated that the matter was a "well legally argued motion." (R 78) Judge Cowart further testified that prior to his appointment of Mr. Dean as petitioner's counsel he had formed an opinion of his competency as a criminal defense attorney and that in his opinion Dean was a very promising and very thorough young attorney (R 81). Judge Cowart testified that Dean's reputation as a criminal defense attorney was excellent. As to Dean's handling of the pretrial hearings and trial itself, Judge Cowart testified that in his opinion Dean did an excellent job with the material he had to work with (R 82). Judge Cowart characterized the strength of the state's case against petitioner as being exceptionally strong (R 83). When Judge Cowart was asked if petitioner ever at any time voiced to him any dissatisfaction with the representation of Mr. Dean, he answered as follows:

A No, on the contrary, I thought that the concept of the Defendant at that time, or the presentation of the Defendant and his general attitude and demeanor toward Mr. Dean was very cordial and certainly there was no representation or allegation of incompetency that I ever joined issue on.

(R 84)

Robert A. Sullivan, petitioner, testified in his own behalf and his direct examination begins at R 17-48; 100-125. On cross-examination (R 126), petitioner testified that he didn't want to be executed (R 131) and would try his hardest not to be executed. However, he stated he would not lie under oath (R 132). When asked if he had ever lied to his attorneys, he responded as follows: "A Positions have been changed due to circumstances that ... might have been different positions at one point of time which, in answer to your question, yes." (R 133) When asked if he had lied to his attorneys on more than one occasion, petitioner replied: "A In regard -- The only area that I recall was a strategy on my part being as a last resort with Mr. Dean regarding clemency well after my trial." (R 134) Petitioner as far as he could recall stated that he had never lied to Mr. Windsor (R 134). Petitioner testified that he first became dissatisfied with Mr. Dean's representation during the course of the trial and he felt that Dean had sold him out (R 143). The first thing that petitioner didn't like about Mr. Dean was the fact that he moved up the trial date (R 145). During the course of the trial petitioner became disappointed with Mr. Dean's representation (R 147). In fact, he was totally disappointed with Mr. Dean's representation of him at the trial. Petitioner was then asked to produce any letters or motions that he filed with Judge Cowart regarding Dean's representation during the year 1974. In answer, petitioner stated that he filed no motions attacking the competency of Mr. Dean either before Judge Cowart or before any other

judicial body (R 149). Petitioner stated that in the year 1974 he did not write any letters to the Bar complaining of Mr. Dean's representation and neither did he write to anybody requesting a substitution of counsel. In 1975, petitioner stated that he complained to David Kendall of NAACP Legal Defense Fund concerning Dean's representation. However, petitioner did not ask Mr. Kendall to appear before the Supreme Court of the State of Florida and ask for a substitution of counsel (R 150, 151). Petitioner stated that he decided to stick with the attorney who he felt had sold him down the river and allow him (Mr. Dean) to argue his appeal in front of the Florida Supreme Court (R 151). Petitioner testified that Kendall had advised him to put aside the issue of ineffective assistance of counsel until the habeas corpus stage of the case had been reached (R 151, 152). Petitioner admitted that in October of 1973 he knew how to raise the issue of ineffective assistance of counsel before Judge Cowart and that he did not forget this while he was sitting on death row (R 153, line 19--R 154, line 2). Petitioner admitted that Kendall advised him that what Mr. Dean was doing was effective (R 155). In the year 1975, no other letters or motions were filed with any court asking for another attorney (R 155). Petitioner testified that following the denial of certiorari in the United States Supreme Court the thought crossed his mind that it was time to change attorneys. However, he stated that in the year 1976 he did not file any motions for substitution of counsel or write any letters to a court asking for another attorney (R 159). Petitioner stated that he never at any time asked Kendall to take over his case because Dean was incompetent and had sold him down the river (R 161, 162). Petitioner stated that because in his opinion Dean did a lousy job defending him that in that context he did not like Mr. Dean. However, he then admitted that he kept this "lousy man" who did a "lousy job" at the trial level

all the way through 1976, all the way to the United States Supreme Court (R 163). Although there were other lawyers working on the civil litigation, petitioner stated that he never advised any of them that he thought Mr. Dean was incompetent and that he didn't want Mr. Dean on the case. During the pendency of the litigation, Sullivan v. Askew, petitioner stated he never told Tobias Simon or anyone else working on that particular aspect of the case that Mr. Dean had given him ineffective assistance at the trial level and that he wanted to raise the issue as a ground for reversal (R 168, lines 6-18). Petitioner further testified that when Dean volunteered to represent him before the Clemency Board that he agreed to this representation. Petitioner admitted that even though he felt Dean had sold him down the river that because of Mr. Kendall's belief that Dean would be best suited to represent him, he agreed to the representation. Petitioner was unhappy with Dean's representation of him at the trial level in every phase thereof, and yet he agreed to allow Mr. Dean to stand up before the Parole Commission and again be his mouthpiece (R 172, 173). Petitioner admitted that at the hearing before the Parole Commission he never at any time complained of Dean's alleged ineffective representation (R 173, 174). Petitioner did state that basically he was satisfied with Dean's representation of him before the Parole Commission (R 175). Petitioner admitted that he did not file any documents between the date of the hearing in front of the Parole Commission, January 17, 1977, and the date he appeared in front of the Executive Clemency Board on March 28, 1977, asking that he be given another attorney or stating to any judicial body that he was dissatisfied with Mr. Dean's representation (R 176). The first time petitioner filed an official pleading before a judicial body raising the ineffective assistance of counsel issue was in the post-conviction 3.850 motion filed before Judge Gable (R 177). Petitioner then admitted

that he waited approximately four years since 1975 to actually file a pleading raising the ineffective assistance of counsel issue (R 178).

Petitioner admitted that on the night he was arrested he had the victim's watch and credit cards in his possession. He had a shotgun in his trunk and he had a tire iron in his trunk. He admitted giving an oral and written statement to Sgt. Felton admitting the killing of Mr. Schmidt. Petitioner admitted taking Sgt. Felton and Detective Lawrence to his hotel room where he showed them the proceeds from the robbery, items taken from Howard Johnson's (R 181, 182). Petitioner admitted that it added up to a pretty strong case (R 182). Petitioner indicated that he understood the meaning of an alibi defense (R 184) and that such defense necessarily meant that he didn't commit the crime. He stated that he told Mr. Windsor that he did not commit the crime (R 185). Petitioner admitted that he gave the statement to Officers Felton and Lawrence (R 186). He again repeated that he told Mr. Windsor that he was innocent and that somebody else committed the murder (R 187). Petitioner denied that he ever told anybody the reason Mr. Windsor got out of the case was because he had admitted to Windsor that he had committed the crime and that Windsor did not want to put him on the stand to suborn perjury. Petitioner stated that one reason he wanted to take a polygraph was to prove the truth of his alibi defense (R 190). There was no coercion on petitioner to take a polygraph test and the state attorney's office had nothing to do with his going to see Warren Holmes (R 191). Petitioner admitted that he was administered a polygraph examination by Warren Holmes (R 193). Petitioner admitted that after having the polygraph administered he had a conversation with Warren Holmes (R 200). Petitioner denied that he admitted to Mr. Holmes that he committed the murder; denied that he admitted to Mr. Holmes that

he had told his previous attorney, Mr. Windsor, that he wanted to take the stand and lie (R 200). Petitioner denied having made any admissions of guilt whatsoever to Mr. Holmes (R 201, 202). Petitioner again stated that he never lied to Mr. Windsor and only lied to Mr. Dean prior to the parole hearing (R 205, 206). Petitioner, when asked if he changed his story about what happened on the night of the murder would that come within his definition of lying, stated that it would (R 206, 207). Petitioner again stated that he never changed his story to Mr. Windsor about what happened on the night Schmidt was killed (R 207). His attention was then drawn to Plaintiff's Exhibit 4 which he identified as a letter he had sent to Ray Windsor on September 24, 1973 wherein the following was stated:

> Q (By Mr. Adorno) "Chris had for his share the credit cards, some of the traveler's checks, not all, most of the change and the rest of the small bills. The money taken out of my coat pocket was mine, not from the robbery. Believe me, I would not have the stomach to kill a person in cold blood and leave the body in a place to be found and on top of that use those -" and, then, you used a money sign on the typewriter, I guess to indicate a word you didn't want to put in print, "credit cards. Can't you see that? I know it will be hard to believe anything I said because of the number of times I have changed my story, but this is it, the truth."
>
> Did you write that to Mr. Windsor?
>
> A If it's in there, I did.
>
> (R 208)

Petitioner was then confronted with p. 2 of Defendant's Exhibit 5 for Identification (R 213, lines 8-19) and then asked what games he played with Mr. Windsor. Petitioner answered that he had reference to something he had explained before regarding Reid McLaughlin (R 213). As to matters he had fibbed about (R 216), petitioner stated this had to do with discrepancies between McLaughlin's participation. When asked why he fibbed about Reid McLaughlin, petitioner answered he was probably just confused (R 217). Petitioner testified

that he had admitted to Mr. Dean after the trial that he had committed the murder (R 218).

Peter Tighe was called as a witness on behalf of petitioner (R 403). Mr. Tighe during the month of April 1973 was a manager at Keith's Cruise Lounge in Hallandale, Florida, and he knew the petitioner, Robert Austin Sullivan (R 403). He stated that he also knew a person by the name of Thomas Murphy (R 404). Mr. Tighe was familiar with the date of April 8, 1973 because it was Billy Harlow's 18th birthday (R 408). Mr. Tighe recalled seeing Mr. Sullivan on April 8, 1973. He stated that petitioner was in the bar around 11:30 p.m. on the date in question (R 409). Tighe admitted that he couldn't tell exactly where petitioner was throughout the night but again stated he was there at 11:30 before the show went on and then afterwards at approximately 2:00 o'clock he (petitioner) sat down and talked to Michael Carmack, another bartender (R 410, 411). On cross-examination, Tighe stated he was almost positive that petitioner was in the bar when he walked in at 7:00 p.m. (E 417, 418). Later, his testimony changed as to the time petitioner came in the bar (R 421). Tighe admitted that all he could really say was that petitioner came into the bar and then left before Carmack came on duty at 10:00 o'clock and that this could have happened at anytime between 7:00 and 10:00 p.m. (R 423). Tighe in answer to the question, why didn't he come forward when he knew petitioner had been sentenced to prison, "I can't tell you why." (R 430, 431) He said he had his own problems and was waiting to contact him (R 431, 432). Tighe admitted that he couldn't see who left the bar between 12:30 and 2:00 a.m. on the morning of April 9, 1973 (R 449). On June 20, 1979, Tighe executed an affidavit and stated that the contents thereof was accurate and represented his total recollection of what happened at that time (R 467, 468).

In Paragraph 5 of the affidavit Tighe alleged that he was presently unable to recall with certainty the hours that Bob Sullivan was present in the lounge on that night (R 468, lines 5-12). The affidavit mentioned nothing about April 8th being Billy Harlow's birthday (R 469). Tighe testified that in 1973 he knew it was impossible for petitioner to have committed the murder but that he was simply too busy with his job and everything else to do anything about it (R 492). Tighe's testimony as to the presence in the bar in the late evening of April 8th and early morning hours of April 9, 1973 was equivocal. Note the following:

> Q Your're telling us that from your own independent recollection, you specifically remember Bob Sullivan at the lounge the night, late evening of April 8th, and the early morning hours of April 9th, 1973?
>
> A Yes.
>
> Q That's of your own independent knowledge?
>
> A Yes.
>
> Q No doubt about it in your mind?
>
> A No, no.
>
> Q You don't really need anything to corroborate your memory on that; you're pretty sure about that?
>
> A Yes. I'd say 99 percent.
>
> Q That he was there?
>
> A Yeah.
>
> (R 498, 499)

Following the above series of questions and answers, Tighe changed his testimony to being 100 percent sure as to petitioner being present in the bar on the dates in question. Note the following:

> Q Oh, there is a chance he was not there at all?
>
> A No. What I'm saying, you know, 99 percent means - that's like 100 percent.
>
> Q No, 99 means 99. 100 means 100.
>
> A I'll go with a hundred percent.
>
> Q I don't want you to go with anything. Do you have an independent recollection?

A Yes.

Q Without anything else helping you?

A Without anyone else helping me, yes.

Q You don't know anything else?

A No.

(R 499)

William Paul Harlow was called as a witness on behalf of petitioner (R 533). Mr. Harlow stated that he remembered being at Keith's Cruise Lounge on April 8, 1973 because he was celebrating his 18th birthday (R 534). Mr. Harlow testified that he and his party arrived at the bar at approximately 11:30 - 12:00 p.m. on April 8th and that he saw petitioner come in the bar before the show started (R 535). On cross-examination, Harlow stated that petitioner was not in the bar when he came in (R 542). Harlow stated that he talked to petitioner approximately five minutes at most (R 544) and after this he went back to his friends (R 545). Harlow then stated that thereafter he couldn't say exactly where petitioner went (R 545). Harlow stated that next time he specifically remembered seeing petitioner was sometime during the show when petitioner was standing by the bar talking to Michael (R 546). The next time Harlow remembered seeing petitioner was sometime after the show ended (R 548). Mr. Harlow also testified that he did know a Thomas Murphy (R 554) but at no time during the evening in question did he see Murphy with petitioner (R 555). Harlow testified that the first time he found out about Mr. Sullivan was when a person named Barry Weaver got in touch with him (R 557). He received some documents and newspaper articles from Mr. Weaver and was requested to get in touch with petitioner's lawyer, Mr. Roy Black (R 557, 558). The documents that Harlow received included petitioner's alibi, i.e., he was at the lounge on the evening in question (R 560).

Mr. Harlow stated that he had been requested to write down his recollection of the events on the night of April 8, 1973 and he did so (R 561). This was typed up and marked as Defense Exhibit 44 for Identification (R 562).

Raymond Martin Windsor was called as a witness by the respondents (R 582). Mr. Windsor stated that he was an attorney admitted to practice in the State of Florida and before the U.S. District Court of the Southern District of Florida. He then outlined his professional background stating that 50 to 60 percent of his practice was in the field of criminal law. He had served as an assistant public defender (R 583). Mr. Windsor first met petitioner in April of 1973 after having been appointed by Judge Cowart to represent him (R 585). In the course of events, Windsor learned about the state's case against petitioner and that the crime with which he was charged was a very heinous one and that there had been an admission by petitioner as to his complicity (R 586, 587). When asked if he had received any other information regarding petitioner's guilt, Windsor answered in the affirmative, explaining that petitioner had admitted to him his participation in the crime (R 587). Windsor could not recall the exact dialogue when petitioner expressed his participation but emphasized that petitioner did acknowledge his guilt although he could not recall the exact words (R 588). Windsor explored the possibility of several defenses and requested a psychiatric report. He did receive a report, State's Exhibits 25 and 28 from Dr. Corwin and Psychologist Norman Reichenberg (R 589). Windsor stated that Dr. Corwin's report corroborated petitioner's admitted responsibility in the matter (R 590). The defense of alibi was explored and this was a defense that petitioner wanted Windsor to utilize by manufacturing for him an alibi defense. Petitioner wanted Windsor to go out and locate alibi witnesses, put them on the stand, and have them perjure

themselves (R 590, line 23--R 59, line 5). Windsor took many depositions in preparation for trial and was aware of the allegation that he had not been present at the taking of certain depositions (R 591). He stated that those depositions were taken by the codefendant's attorney, Steven Bronis (R 591, 592). Windsor had an agreement with Bronis regarding the taking of those depositions and this involved an aspect of Windsor's trial strategy. Note the following:

> A Yes. It was my intent to have Mr. Bronis take the depositions of those witnesses, have them typed up, thereby giving me the opportunity to read those depositions; then, have a second bite at the apple, so to speak. I didn't think I would have any problem retaking depositions of witnesses whose statements I would want to thoroughly to into, or more thoroughly to into or more greatly clarify.
>
> I wanted to have an opportunity to have them down on the record as many times as I possibly could, in order to obtain as many inconsistencies as possibly could be obtained.
>
> (R 592)

There came a time when Windsor wanted to withdraw as counsel of record for petitioner (R 593). He identified Defendant's Exhibit 23 as a transcript of the hearing on the motion to be relieved of responsibility for handling petitioner's case. When asked what he did not tell the court as to his reason for wanting to withdraw, Windsor responded as follows:

> A Essentially, Mr. Sullivan wanted me to pursue an alibi defense for him. Apparently he would have wanted to call certain witnesses who he would be contending would be able to place him at a scene different from the place of the alleged homicide at the time and it was absurd, because prior to that time Sullivan had communicated to me his participation in this matter and now he wanted me to establish or manufacture an alibi defense for him.
>
> I didn't go to the Court and say Judge, Mr. Sullivan wants me to suborn perjury, and Mr. Sullivan wants to get on the stand and perjure himself. I didn't feel it was incumbent upon me to be an accuser. I was still his lawyer. I felt it was still necessary for me, until I was - while I was still in this case to protect him as best I can and not prejudice his right before this, the same or any other judge.

So, I deliberately told the Court, being rather vague, merely advising the Court that he wanted me to utilize a particular defense, but I felt it wasn't in his best interest and as a result of that, we had a communication breakdown.

(R 593, 594)

Windsor next identified the handwriting on Defendant's Exhibit 26 as being that of petitioner and his initials, RMW, appearing in the upper left hand corner (R 594, 595). Windsor recalled that the name of Thomas Murphy came up and that an effort was made to locate him (R 595). However, this was unsuccessful and Windsor stated that the man had not been located to this day (R 596). Windsor was aware that he had been charged with taking the burden on the motion to suppress and stated in retrospect this was a technical error (R 596). He explained that although it was not incumbent on him to accept that burden (R 596) he did not think it had any practical effect on the outcome of the motion (R 597). Windsor explained that Judge Cowart, considering the gravity of the offense, gave himself and Mr. Bronis all the latitude in the world to ask any questions that were believed to be relevant (R 597). At the time of the hearing on the motion to suppress, Windsor had read the depositions of the lead investigators (R 597) and was aware of what their testimony would be (R 598). Note the following:

Q In your opinion, did your assuming the burden of going foward on the motion to suppress have any bearing on the ultimate result?

A None whatsoever.

Q In your opinion, was there any prejudice to your case by going forward?

A None.

Q Have you ever in the ten years that you have been practicing law been accused of giving ineffective assistance of counsel before?

A No. This is the first time.

(R 598)

Warren Holmes, polygraph examiner, was called as a witness by the respondents (R 515). Mr. Holmes first stated his experience in the area of polygraph examination and said that he averaged about 1,200 cases per year. He had been employed as a polygraph examiner for approximately 26 years (R 515). He stated that on October 31, 1973 petitioner was submitted to him for polygraph examination by his attorney, Dennis Dean. He took some background information to learn petitioner's version of what it was he was supposed to be tested on (R 517). The essence of what the polygraph examination was to be on was whether petitioner had been involved in the murder of Donald Schmidt. Petitioner told Holmes that he didn't commit the crime and stated he had an alibi for the particular time. Some test questions were phrased and a polygraph examination was then administered to petitioner. At the conclusion of the polygraph examination, Holmes had a conversation with petitioner which was memorialized in the report submitted to petitioner's attorney (R 518, 519). Holmes identified Defendant's Exhibit 12 for Identification as being a true and accurate copy of the report submitted to Mr. Dean (R 519). After the examination was concluded, Holmes had a conversation with petitioner and advised him that on the basis of the polygraph charts that petitioner wasn't telling the truth. He went over the graphs with petitioner question by question and showed him the physiological reaction that was indicative of deception. Petitioner then told Holmes that he had tried to plead guilty but that the state wouldn't accept his plea. Petitioner further remarked to this witness as follows:

> He told me that he had told the Assistant Public Defender that he was guilty and that he wanted to take the stand and to lie about it, but that the Assistant Public Defender didn't want him to do that, so, he made arrangements to get another attorney, which was Mr. Dean.
>
> He said he didn't want to confess to Mr. Dean, because it would put him in a compromising position.

> Then, he admitted to me that he did, in fact, kill Donald Schmidt; that he had taken him out of the Howard Johnson's Restaurant to a place where he was found; that he hit him with a tire iron and that he shot him with this gun he called Betsy.
>
> Then, I asked him why he did it and he said that for two reasons, that he had a fascination about the act of murder and that he wanted to see if he could live up to the test of killing somebody.
>
> Then, he said the other factor was that a revenge against Howard Johnson's for having him prosecuted in a theft there.
>
> That, in essence, is what he told me.
>
> (R 520, 521)

Mr. Holmes stated that this was the first time in 26 years that he had ever testified on a confidential report (R 522). On redirect examination, Holmes stated as to the one encompassing question, were you in Keith's Cruise Lounge at the time Donald Schmidt was shot, (R 530, 531) he went over petitioner's response to this particular question and explained that in his opinion there was a deceptive reaction. It was at this time that petitioner began to tell a different story (R 531).

When asked if he had an independent recollection of this particular polygraph examination, although it was seven years ago, Holmes responded:

> A Yeah, because it was two things that he told me in that confession that I had not heard before or not as a routine. One, when he told me that this young Assistant State-Attorney didn't want him to take the stand and lie --
>
> Q You mean Public Defender?
>
> A Public Defender, which I thought was a noble gesture on the part of the Public Defender and the other was the fact that most of the murder confessions that I have taken are done on impulse or out of fear or hatred. It's unusual for someone to tell me that he had a fascination for the act of murder and also whether or not he could measure up to the test of killing a human being.
>
> I've taken hundreds and hundreds of murder confessions and nobody has ever told me that they committed a murder to see whether they could measure up to the test of killing a human being.

I didn't need any notes to remember that statement on his part.

(R 532, 533)

Robert Sullivan, petitioner, was called as a witness by the respondents (R 614). When questioned as to Defendant's Exhibit 26 for Identification, petitioner through his counsel invoked the Fifth Amendment, and it was stipulated that as to any questions regarding this particular exhibit that petitioner through his attorney would invoke the Fifth Amendment (R 615, 616). Counsel for respondents desired to explore several areas, particularly two, with respect to this particular exhibit. The areas that respondents desired to question petitioner on as to this exhibit were as follows:

> Number one would have been the veracity of what I believe has already been identified as Mr. Sullivan's handwriting, given to Mr. Windsor, of Defendants' Exhibit 26 for Identification, with respect to the truth of the actual commission of the murder of Donald Schmidt, which the Plaintiff admits in this particular exhibit and also with respect to the setting up of an alibi defense by the returning to Keith's Cruise Lounge after the murder was committed between 2:30 and 3:00 o'clock A.M., in their attempts to make it look like they had been there earlier.
>
> Those are the two main areas, although there were other areas I would have examined as to relevant issues that have been raised, both in the Plaintiff's case and also during our brief portions of our case.

(R 616, 617)

Petitioner expressed his opinion that Mr. Black was the first lawyer that had effectively represented him (R 619). He stated that he was aware of the issues involved in the Rule 3.850 filed in state court and in the instant habeas petition filed in federal court and had had an opportunity to fully discuss those issues with Mr. Black (R 620). Petitioner couldn't think of anything else that had not been covered or raised in those petitions relative to the issue of his receiving a fair trial and fair representation (R 621). When asked if it was his opinion that Warren Holmes

lied under oath, petitioner's counsel objected and invoked the Fifth Amendment (R 622). Respondents objected to petitioner's being allowed to take the Fifth Amendment on this issue (R 624). After some discussion, this court permitted petitioner to follow his counsel's advice and decline to answer on the basis of Fifth Amendment rights. Petitioner stated that he remembered Ray Windsor saying that he (petitioner) had told him that he admitted his participation in the killing of Donald Schmidt (R 629). Petitioner admitted that he had heard Mr. Windsor's testimony to the effect that petitioner had told him (Windsor) that he wanted to take the stand and proceed with a fabricated alibi defense (R 629, 630). Petitioner when asked if he denied admitting the crime to Mr. Windsor invoked his Fifth Amendment privilege. Counsel responded that on original cross petitioner had specifically denied ever making such a statement to Ray Windsor (R 630). The court permitted petitioner to again invoke his Fifth Amendment privilege (R 631, 632). Petitioner was subsequently permitted to invoke the Fifth Amendment privilege as a bar to answering pertinent questions propounded by counsel for respondents (R 632, 633). Petitioner stated that as best he could recall after taking the polygraph examination there was only one occurrence in which Mr. Dean mentioned it. This was just that he had received it, not what was in the report (R 644, 645). The only other thing petitioner recalled was that he wrote Dean and told him to retain the polygraph report in his files. Petitioner then stated that through December 1974 he was unaware of what Mr. Holmes was saying had transpired at the polygraph examination (R 645). Respondents at this time moved into evidence Defendant's Exhibit 3 which was a letter that petitioner had invoked the Fifth Amendment when asked to identify his handwriting. The exhibit was admitted in evidence (R 645, 646). When

questioned about admissions made in this letter, respondents' Exhibit 3 (R 646), petitioner again invoked his Fifth Amendment rights (R 647). The paragraph read from respondents' Exhibit 3 to which petitioner invoked his Fifth Amendment privilege was as follows:

> Q (By Mr. Adorno) Reading from the last paragraph on Page 1, "Fourth and possibly the most important, is there any way I could have another court-ordered psychiatric examination? There is one prime reason of this request at this late date. Obviously, my position is more extreme than before trial and this has, in part, been a prime motivating force. I will brief you on this because you have already seen on that polygraph report that I do admit the crime, which is obvious from close examination anyway."
>
> (R 646, 647)

As to all remaining questions relating to this exhibit, petitioner invoked his Fifth Amendment privilege (R 648). When asked if he committed the murder, petitioner answered in the negative (R 651). Petitioner then admitted having been examined by Dr. Corwin prior to trial. But when asked if he admitted to Dr. Corwin his participation in committing the murder, objection was made by his counsel (R 651). The objection was sustained (R 655). Petitioner again indicated he would invoke the Fifth Amendment privilege with respect to identifying a group of letters. Counsel for respondents indicated that questions would be propounded to petitioner concerning Defendant's Exhibits 2, 7, 27, 4, 5, 10, and 8. Counsel for petitioner indicated that the privilege was asserted (R 656). As to the relevancy of the letters that had been offered in evidence, counsel for respondents remarked as follows:

> MR. ADORNO: Judge, the problem here, he's put that in issue quite clearly by saying I didn't do it, you didn't investigate an alibi defense and he denies Holmes and his comments to Windsor.

> How is the Court going to weigh whether Windsor is telling the truth or whether Holmes is telling the truth or whether Mr. Sullivan is telling the truth, unless either through cross examination or direct examination something is brought to light that shows that he is inconsistent, that is, he being the Plaintiff.
>
> These letters are not being introduced to show whether he did or did not commit the crime, but only to show that Mr. Windsor and Mr. Holmes' testimony is corroborated, that he did make those statements.
>
> I didn't tell him to put it in issue. I didn't tell him to stand up here and say I deny committing the crime.
>
> He is absolutely right, he is entitled to a habeas and he is entitled to a 3.850 and ineffective assistance of counsel, but when he puts at issue that he did not commit the crime and that certain individuals didn't do their job and one of them, for example, was the alibi defense, I think the whole issue as to whether he did or did not commit the crime is now in issue and any admissions he makes comes in for that purpose to impeach him and it corroborates the State's witnesses.
>
> (R 664, 665)

The remainder of petitioner's testimony was a continual invocation of the Fifth Amendment privilege as to questions propounded by respondents' counsel (R 672-678; 682-687; 689-706).. When asked by the court if he was satisfied with what had been done at the hearing on his behalf by his attorney, petitioner answered, "I am, Your Honor." (R 708) Petitioner was excused and counsel for respondents then offered in evidence Defendant's Exhibits 43 and 44 which were the affidavits of Mr. Tighe and Mr. Harlow (R 709). Counsel for petitioner had no objection and same were admitted in evidence as Respondents' Exhibits 43 and 44 (R 710). Defendant's Exhibit 28, the psychological evaluation of petitioner by Norman Reichenberg, was introduced in evidence (R 710). Dr. Corwin's report,. defense Exhibit 25 for Identification was introduced in evidence over objection of petitioner's counsel (R 711). Other documents were admitted in evidence and the court then set a date for filing the transcript of this hearing and establishing a briefing schedule (R 717).

The foregoing resume of testimony taken at the hearing before this court on March 6, 7, and 10, 1980 is for the purpose of aiding this court in its review of the testimony presented and deciding upon the ultimate facts upon which it will rely. Hopefully it will be of some aid to this court in finally disposing of this cause on the merits.

According to this court's order dated February 12, 1980, the issues on which testimony was to be presented are stated as follows:

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS BECAUSE OF THE STATE COURT TRIAL JUDGE'S DECISION NOT TO PERMIT HIM TO BE PRESENT AT THE EVIDENTIARY HEARING ON HIS MOTION TO VACATE FILED PURSUANT TO Fla.R.Cr.P. 3.850.

II.

WHETHER THE REPRESENTATION OF COURT-APPOINTED ATTORNEY RAYMOND WINDSOR CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

III.

WHETHER THE REPRESENTATION AFFORDED PETITIONER BY COURT-APPOINTED ATTORNEY DENNIS DEAN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS BECAUSE OF THE STATE COURT TRIAL JUDGE'S DECISION NOT TO PERMIT HIM TO BE PRESENT AT THE EVIDENTIARY HEARING ON HIS MOTION TO VACATE FILED PURSUANT TO Fla.R.Cr.P. 3.850.

In the initial petition for writ of habeas corpus filed June 25, 1979 in Paragraph 12 thereof, petitioner set forth in detail the grounds upon which his claim of illegality of conviction and death sentence were premised. Respondents filed an Answer to the petition and discussed seriatim all issues raised under Paragraph 12 of the

petition. Respondents at this time reaver each and every those arguments made in the answer just as though the same were set forth herein in haec verba.

Petitioner subsequently filed an Amended Petition for Writ of Habeas Corpus and respondents filed a Supplemental Response (Answer) to Petition and Amended Petition for Writ of Habeas Corpus. In this supplemental response the issue of the necessity for petitioner's presence at the state court evidentiary hearing was discussed. Please see pp. I-3 of the supplemental response which by reference is incorporated herein just as though the same were set forth herein in haec verba.

There can be little question in anybody's mind but that petitioner received a full and fair hearing before this court. That being so, it appears that the question of whether the state court trial judge erred in refusing to have petitioner returned for the state court hearing on the 3.850 motion is moot. Therefore, unless further instructed by this court so to do, respondents will rely upon the arguments above-referenced in support of their position that the state court trial judge did not err.

II.

WHETHER THE REPRESENTATION OF COURT-APPOINTED ATTORNEY RAYMOND WINDSOR CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

III.

WHETHER THE REPRESENTATION AFFORDED PETITIONER BY COURT-APPOINTED ATTORNEY DENNIS DEAN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The testimony of Ray Windsor previously discussed in this brief shows conclusively that he had an agreement for Steve Bronis, counsel for petitioner's codefendant, to take several of the depositions. The strategy involved in this was that after said depositions taken by Bronis had been transcribed Windsor could review them and decide

if he needed to retake any of the depositions that Bronis had taken. This, in effect, would give "two bites of the apple" in an effort to create as much inconsistency as possible. Windsor read all of the depositions and nothing was made to appear at the hearing before this court or anywhere else that prejudice resulted to petitioner because Windsor was not present at the taking of every deposition.

It is claimed also that Windsor rendered ineffective assistance of counsel because at the hearing on the motion to suppress he along with Steve Bronis assumed the burden of going forward with the evidence rather than having the state do so. Windsor testified that he was in no way hampered in the presentation of his testimony in petitioner's behalf because of having assumed this burden. Judge Cowart granted broad discretion to the attorneys as far as asking necessary questions. Windsor gave it as his considered opinion that the fact of his going forward with the evidence at the suppression hearing in no way influenced the final ruling by Judge Cowart. Respondents note with interest that while Judge Cowart was on the witness stand, petitioner at no time inquired of him as to whether Windsor's assuming the burden of going forward with the evidence at the suppression hearing influenced his decision to deny the motion to suppress.

In contemplating the services rendered by Dennis Dean in behalf of petitioner, one wonders what degree of expertise is necessary on the part of a defense counsel in order to withstand a charge of ineffective assistance. When this charge is viewed in the light of what Dennis Dean actually did in representing petitioner, it becomes the absurdity of all absurdities. Frankly, the charge is so ridiculous that to make an effort towards refuting same lends it an undeserved dignity.

It is believed that the main thrust of petitioner's assertions made in support of his claim of ineffective assistance of counsel has to do with the alleged failure of Dean to secure the attendance of so-called alibi witnesses. Other matters were raised in petitioner's effort to support his claim of ineffective assistance but all of them were thoroughly explained by Dean in his testimony at the hearing.

To begin with, it must be emphasized that a court-appointed attorney is not vulnerable to a charge of ineffective assistance because of not obtaining testimony of an alibi witness where such testimony could not be considered an alibi. Mays v. Estelle, 610 F.2d 296 (5th Cir. 1980). Something else that should not be forgotten is that there is a presumption that counsel rendered effective assistance and to overcome that presumption on collateral attack the petitioner must shoulder a heavy burden. Catches v. United States, 582 F.2d 453 (8th Cir. 1978); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), cert. denied 492 U.S. 1053. When this presumption is viewed against the background of the testimony of Judge Cowart and Judge Gable as to Mr. Dean's reputation for excellence in the field of criminal law, then the presumption must, indeed, become a heavy burden. A reminder--there was no expert testimony whatsoever produced by petitioner to the effect that Dean's representation of petitioner either at the trial or appellate level constituted as a matter of law ineffective assistance of counsel. Thus, the testimony of Judge Cowart and Judge Gable stands uncontradicted, unchallenged, and unimpeached.

We think a discussion of applicable case law, state and federal, is in order.

In Beckham v. State, 339 So.2d 221 (Fla.App. 3 1976), the court remarked as follows:

> To successfully collaterally attack a judgment on the grounds of ineffective assistance of counsel, the facts alleged must demonstrate that the trial was a mockery or a farce. Simpson v. State, 164 So.2d 224 (Fla. 3d DCA 1964); Quesada v. State, 321 So.2d 442 (Fla. 3d DCA 1975).
>
> Further, mishandling of a trial with regards to matters falling within the judgment or strategy of counsel does not constitute ineffective assistance of counsel. Solloa v. State, 227 So.2d 217 (Fla. 3d DCA 1969).

Id. at 222. See also United States v. Childs, 571 F.2d 315 (5th Cir. 1978).

We think the remarks of the Second District in State v. Eby, 342 So.2d 1087 (Fla.App. 2 1977), are particularly appropriate:

> Secondly, a decision not to raise certain possible defenses or call certain defense witnesses is ordinarily a matter of personal judgment and strategy within the prerogatives of defense counsel. As such, it is not a proper predicate for a collateral attack on the competence of counsel unless it is so irresponsibly exercised as to constitute "inadequate" representation. Here, the undisputed testimony of trial counsel revealed a deliberative, well-founded decision to pursue the course taken which, on its face, is not unreasonable nor irresponsible. No evidence was before the trial court to support a contrary finding; and neither second-guessing nor substituting the court's own hindsight judgment for that of trial counsel will suffice to reject as "inadequate" the role of trial counsel.

Id. at 1089, 1090. Similarly, the remarks of the Third District in Wingert v. State, 353 So.2d 643 (Fla.App. 3 1977), are particularly appropriate. Note the following:

> Rather, it is apparent from the record that the decision not to move to suppress the recorded statement was made at the time because trial counsel felt that the exculpatory portions of the statement were strong enough to serve the purpose of getting defendant's explanation of the killing before the jury without putting the defendant on the stand. Such a decision is not the kind that would establish incompetency of counsel. See State v. Eby, 342 So.2d 1087 (Fla. 2d DCA 1977); and Odom v. U.S., 377 F.2d 853 (5th Cir. 1967).

Id. at 645.

The Fifth Circuit has held that the governing standard for appointed counsel is reasonably effective assistance. Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Mac Kenna v. Ellis, 280 F.2d 592 (5th Cir. 1960). However, as later stated by that court, Akridge v. Hooper, 545 F.2d 457 (5th Cir. 1977), reasonable competency is based on the situation, the circumstances, and the law as understood at the time. Certainly, the effectiveness of counsel does not require an imaginative assertion of every possible theory of defense or mitigation which might in the unpredictable future turn out to be accepted by some court, some day, in some case. Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977). Simply stated, due process of law in this context simply means that an accused must have such assistance as will assure him of due process of law. Pineda v. Bailey, 340 F.2d 162 (5th Cir. 1965).

A defendant has the right to reasonably effective assistance of counsel but he does not by any stretch of the imagination have the right to errorless counsel. United States v. White, 524 F.2d 1249 (5th Cir. 1975). Cf. Tollett v. Henderson, 411 U.S. 258, 36 L.Ed.2d 235, 244, 93 S.Ct. 1602 (1973). In other words, the correct legal standard for such "range of competence" is that of "[N]ot errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960). If this standard is followed, then the force of reason compels the conclusion obviously reached by the trial judge that petitioner did, indeed, receive effective assistance of counsel. See also Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). It is submitted that in an area where intuitive judgments and spontaneous decisions are often

required, retrospective judgment of the artistry of the advocate is most difficult because the elements influencing judgment usually cannot be captured on the record. Thus, the representation afforded by any lawyer to his client is not readily capable of later audit like a bookkeeper's. For example, see Arnold v. Wainwright, 516 F.2d 964 (5th Cir. 1975). It is submitted that the adequacy of representation which petitioner received can only be decided on an evaluation of the services rendered in his behalf. However, a retrospective examination of a lawyer's representation for the purpose of determining whether same was free from error would surely exact a higher measure of competency than the prevailing standard. See McMann v. Richardson, 397 U.S. 759, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970).

In Fitzgerald v. Estelle, 505 F.2d 334 (5thCir. 1974), the court opined that the test in assessing the effectiveness of counsel is whether said counsel was likely to and did render reasonably effective assistance to a defendant. In Wainwright v. Sykes, 433 U.S. 72 (1977), the United States Supreme Court proclaimed that it was clear that trial counsel need not consult with his client on matters at trial:

> In Henry v. Mississippi, 379 U.S., at — 451, the Court noted that decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby foregone, except where "the circumstances are exceptional." Footnote 14, p. 91.
>
> Chief Justice Berger, concurring, held:
>
> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate--and ultimate--responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as

Id. at 93.

In Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), the Fifth Circuit enunciated the constitutionally required minimum standard for assistance of counsel, stating:

> The governing standard is reasonable effective assistance. One method of determining whether counsel has rendered reasonable effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation.

Id. at 128. Further, in Herring v. Estelle, supra, at 218, the court went on to say that it was defense counsel's job to provide the accused with an understanding of the law in relation to the facts. The advice defense counsel gives need not be perfect, but it must be reasonably competent. Effective assistance of counsel has been interpreted not to mean errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. United States v. Gray, 565 F.2d 881 (5th Cir. 1978), cert. denied, 435 U.S. 955; United States v. White, 524 F.2d 1249 (5th Cir. 1975); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960). In White, supra, the petitioner complained that his attorney should have objected to the seating of some of the jurors, and further stated that counsel failed to object to the introduction of suppressed evidence. White also contended that his counsel ineffectively presented his insanity defense. The court in this case affirmed petitioner's conviction, stating that "the best lawyers have to take the facts as they are and can only do their best to present those facts in any available favorable light." United States v. White, supra, at 1253. Counsel put on petitioner's alibi defense. Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972); Pennington v. Beto, 437 F.2d 1281 (5th Cir. 1971). A review of the state court trial transcript, the transcript of evi-

of the habeas hearing held in this court in March 1980 demonstrates that petitioner's claim of ineffective assistance is without merit. Again, we emphasize that petitioner's burden to establish his claim of ineffective assistance is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation. United States ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976); Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971). To reiterate, petitioner charges Windsor with ineffective assistance of counsel, not because necessary depositions of prospective witnesses were not taken, but because Windsor wasn't present when all of the depositions were taken. We point out that there is no constitutional right to pretrial discovery depositions in a criminal case. United States v. Adock, 558 F.2d 397 (8th Cir. 1977), cert. denied, 434 U.S. 921; United States v. Nichols, 534 F.2d 202 (9th Cir. 1976). In any event, this, as previously explained, was a matter of trial strategy on Mr. Windsor's part. To say that this constitutes ineffective assistance of counsel is speculative at best and speculative claims are not enough to support such a charge. Packnett v. United States, 435 F.2d 693 (5th Cir. 1970); Haggard v. State of Alabama, 550 F.2d 1019 (5th Cir. 1977).

In the recent case of United States v. Gray, 565 F.2d 881 (5th Cir. 1978), cert. denied, 435 U.S. 955, the court remarked as follows:

> We begin with the settled principle that the right to counsel of one's choice is not absolute as in the Sixth Amendment right to the assistance of counsel. United States v. Sexton, 5 Cir. 1973, 473 F.2d 512; United States v. Harrelson, 5 Cir. 1973, 477 F.2d 383, cert. denied, 414 U.S. 847, 94 S.Ct. 133, 38 L.Ed.2d 95. Second, time spent in preparation is only one of many factors to be considered in determining such claims. Herring v. Estelle, 5 Cir. 1974, 491 F.2d 125, 127; Doughty v. Beto, 5 Cir. 1968, 396 F.2d 128, 130; Loftis v. Estelle, 5 Cir., 1975, 515 F.2d 872, 875; Summers v. United States, 5 Cir., 1976, 538 F.2d 1208, 1210 n. 3; Jones v.

> Henderson, 5th Cir., 1977, 549 F.2d 995, 997. The appropriate test to be applied is whether counsel was reasonably likely to render and did render reasonably effective counsel. E.G., Herring v. Estelle, supra; Hudson v. State of Alabama, 5 Cir., 1974, 493 F.2d 171, 173.
>
> A review of the Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record. This Circuit does not blindly accept speculative and inconcrete claims of "what might have been if." If an appellant can point to specific examples of ineffectiveness, we have not hesitated to grant a new trial or hearing. See, as examples of this methodology, United States v. Edwards, 5 Cir., 1974, 488 F.2d 1154, 1163; Doughty v. Beto, supra; United States v. Fruge, 5 Cir., 1974, 495 F.2d 557; Hora v. State of Louisiana, 5 Cir. 1974, 495 F.2d 1248; Lee v. Hopper, 5 Cir., 1974, 499 F.2d 456, 462-65, cert. denied, 419 U.S. 1053, 95 S.Ct. 633, 42 L.Ed.2d 650; Fitzgerald v. Estelle, 5 Cir. 1975, 505 F.2d 1975, 505 F.2d 1334, 1338-42 (en banc), cert. denied, 422 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675; Loftis v. Estelle, 5 Cir., 1975, 515 F.2d 872, 875-76; Howard v. Henderson, 5 Cir., 1975, 519 F.2d 1176, 1178, cert. denied, 423 U.S. 1036, 96 S.Ct. 573, 46 L.Ed.2d 412; Jerkins v. United States, 5 Cir., 1976, 530 F.2d 1203, 1204 n. 1; Mason v. Balcom, 5 Cir., 1976, 531 F.2d 717, 723-25; United States v. Fessel, 5 Cir., 1976, 531 F.2d 1275, 1278-79; Trahan v. Estelle, 5 Cir., 1977, 544 F.2d 1305, 1316-20 (Goldberg, J., specially concurring); Haggard v. State of Alabama, 5 Cir. 1977, 550 F.2d 1019, 1022-23.

Id. at 887. It should be noted that the Fifth Circuit's totality of circumstances test, as explicated in United States v. Gray, supra, does not mean that a single error can render counsel's assistance ineffective. We think the case of Webster v. Estelle, 505 F.2d 926 (5th Cir. 1975), well expressed the Fifth Circuit's opinion on the issue of ineffective assistance of counsel. Note the following:

> The fundamental rules by which petitioner's claim must be judged are well settled. The burden of proof is on the petitioner in a habeas corpus proceeding. A judgment of conviction must be presumed to have been reached in accordance with due process unless otherwise shown. "If the result of the adjudicatory process is not to be set at naught, it is not asking too much

> that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside and that it be sustained not as a matter of speculation but as a demonstrated reality." Adams v. United States, 317 U.S. 269, 281, 63 S.Ct. 236 (1942). [cites omitted]

Id. at 928.

Petitioner alleges that his court-appointed counsel, Dennis Dean, failed to request a continuance of the trial date and thus deprived himself of adequate time in which to prepare. Mr. Dean denied this emphatically in his testimony. However, the Fifth Circuit's position on this issue is clear: shortness of preparation time alone is not enough to establish a claim of ineffective assistance of counsel. The petitioner must show more than counsel's brief preparation period. Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974). In other words, the petitioner must show that as a result of such brief preparation that his counsel committed other specific errors which rendered him ineffective. In the instant case, petitioner has woefully failed to carry this burden.

The Fifth Circuit has excused a wide variety of failures and omissions on the basis that such actions or inaction amounted to well-considered trial tactics. See Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Winters v. Cook, 489 F.2d 174 (5th Cir. 1973); United States ex rel. Reis v. Wainwright, supra; United States v. Garza, 563 F.2d 1164 (5th Cir. 1977). Two opinions which have addressed the attorney-client relationship in depth are Williams v. Beto, supra, and the special concurrence in Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978). Both conclude that the trial tactics and strategy are particularly within the province of the attorney and that a petitioner would have to show more than mere mistakes or faulty judgment. In Wright v. Estelle, supra, the Fifth Circuit commented as follows:

> If he decides to accept an attorney, the defendant has necessarily delegated important decisionmaking authority to his attorney. The scope of the delegation does not turn on the importance of the decision--the attorney frequently makes judgments affecting the very life of the defendant. The question here is twofold: who is in a better position to judge trial strategy and who is in a better position to ensure the best interests of the defendant. This court's history is filled with the recognition of the value of an attorney. No one could seriously contend that a defendant is in a better position to dictate trial strategy than his attorney.

Id. at 1071.

Again, respondents emphasize that counsel's efforts need not be perfect, just reasonably competent. Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). Also, counsel's performance "is not judged by a retrospective consideration as to whether the advice of counsel was or was not the best that could have been given." Ballard v. Blackburn, 583 F.2d 159, 163 (5th Cir. 1978). See also Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), where the court stated, "it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight." Id. at 706.

In summary, petitioner sub judice has failed to show that either of his court-appointed counsel, Ray Windsor or Dennis Dean, was ineffective. He has failed to show that he was prejudiced in any way by either counsel's conduct. Davis v. State of Alabama, 596 F.2d 1214 (5th Cir. 1979).

Respondents reaver each and every the matters and things in their Motion to Strike Complaint of Ineffective Assistance of Counsel and Memorandum of Law in support thereof just as though the same were set forth herein in

CONCLUSION

The petition for writ of habeas corpus should be denied.

JIM SMITH
Attorney General

By: Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENTS
The Capitol
Tallahassee, Florida 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Memorandum Brief to Roy E. Black, P.A., 150 S.E. 2nd Avenue, Ste. 1402, Miami, Florida 33131, by mail, this 5th day of May 1980.

Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel